TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 710.

A. G. SPALDING & BROS., PLAINTIFF IN ERROR,

vs.

WILLIAM H. EDWARDS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 24, 1922.

(29,260)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 17, 1922.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the District Court bfeore you, or some of you, between A. G. Spalding & Bros., plaintiff, and William H. Edwards, formerly Collector of Internal Revenue for the Second District of New York, defendant, a manifest error hath happened to the great damage of said plaintiff as is said and appears by its complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the plaintiff aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Judges of the United States Supreme Court at the City of Washington, together with this writ, so that you have the same at the said place before the said Supreme Court aforesaid on the 27th day of November, 1922, that the record and proceedings aforesaid being inspected the said Judges of the United States Supreme Court may cause further to be done therein to correct that error, what of right and according to law and custom of the United States ought to be done.

Witness, the Honorable William H. Taft, Chief Justice of
2 the United States, this 28th day of October in the year of our Lord One Thousand Nine Hundred and Twenty-two, and of the Independence of the United States the One Hundred Forty-Seventh.

ALEX GILCHRIST, JR.,
Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

L. HAND,
United States District Judge.

Filed October 30, 1922.

3 *Summons.*

United States District Court for the Southern District of New York.

L. 23, p. 45.

A. G. SPALDING & BROS. Plaintiff,

against

WILLIAM H. EDWARDS, Collector of Internal Revenue for the Second District of New York.

To the above-named defendant:

You are hereby summoned to anwser the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Hon. Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 14th day of September in the year one thousand nine hundred and twenty.

[SEAL.] ALEX GILCHRIST, JR.,
Clerk.

LORD, DAY & LORD,
Plaintiff's Attorneys.

Office and Post Office Address, 49 Wall Street, Borough of Manhattan, New York City.

4 United States District Court for the Southern District of New York.

A. G. SPALDING & BROS., Plaintiff,

against

WILLIAM H. EDWARDS, Collector of Internal Revenue for the Second District of New York, Defendant.

Third Amended Complaint.

The Plaintiff above, by its attorneys, Lord, Day & Lord, for its third amended complaint, alleges as follows:

For a First Cause of Action.

First. That the Plaintiff is, and at all the times herein mentioned was, a corporation duly organized and existing under the laws of the State of New Jersey, and was and still is a citizen of the United States,

having a principal office and place of abode in the County of New York, City and State of New York, within the territorial boundaries of the Second Internal Revenue District of said State.

Second. Upon information and belief, that the Defendant, from the first day of January, 1919, and at all the times herein mentioned and at the time of the commencement of this action, was the collector of Internal Revenue for the Second District of New York, and was and now is an inhabitant and resident of the Southern District of New York.

Third. That on or about the 28th day of February, 1919, the Defendant, acting as such Collector of Internal Revenue for the
5 Second District of New York, and claiming to act under Section 600 of the Act of Congress approved October 3, 1917, known as the War Revenue Act of 1917, demanded of the Plaintiff the sum of five and 70/100 dollars ($5.70) which the Defendant claimed to be then due and payable from the Plaintiff as and for a tax due on the sale of certain goods and commodities which were manufactured or produced by the Plaintiff in the United States and sold by the Plaintiff in the month of January, 1919, and threatened to enforce the payment of the said tax, together with penalties and interest provided by the laws of Congress.

Fourth. That thereupon the Plaintiff did, on or about the 28th day of February, 1919, solely in order to prevent distraint and sale of its property and upon compulsion and under duress and coercion, involuntarily pay to the Defendant as such Collector of Internal Revenue the said sum of five and 70/100 dollars ($5.70), and the Plaintiff at the time of payment protested to the Defendant in writing that no tax was due from the Plaintiff on said sale, and that the Defendant was without authority to exact or collect the sum or any part thereof.

Fifth. Upon information and belief, that there was not on the 28th day of February, 1919, or at any other time, any sum due from the Plaintiff for or on account of any tax upon the said sale, and the Defendant as such Collector of Internal Revenue or otherwise was without authority to exact or collect the said sum of five and 70/100 dollars ($5.70).

Sixth. That, thereafter, and on or about the 20th day of April, 1920, the Plaintiff, in accordance with the provisions of law
6 and the regulations of the Treasury Department in such cases, made a claim and application in writing to the Commissioner of Internal Revenue and duly demanded the refund and repayment to Plaintiff of the said sum so paid as aforesaid on the ground that said tax was erroneously and illegally assessed and collected, inasmuch as the said tax was assessed upon articles exported from the United States to a foreign country, in violation of the Constitution of the United States.

Seventh. That the facts with respect to the transaction upon which the above-mentioned tax was collected, are as follows:

Delgado & Cia, a firm engaged in the mercantile business at La Guaira, a city in Venezuela, a foreign country, under date of November 20, 1918, ordered Scholtz & Co., a firm of shipping and export commission merchants with offices at 82 Wall Street, New York, N. Y., to purchase for their account and risk certain goods, wares and merchandise, including certain baseballs and baseball bats, and to cause the same to be shipped to them at said La Guaira, in said Venezuela. A copy of said order is hereto annexed, marked "Exhibit A," and made a part hereof.

Pursuant to said order, said Scholtz & Co. on December 10, 1919, sent a written order to the Plaintiff, A. G. Spalding & Bros., for said goods, wares and merchandise, including said baseballs and baseball bats, a copy of which order is hereto annexed, marked "Exhibit B," and made a part hereof. Pursuant to said order from said Scholtz & Co. the Plaintiff, on January 22, 1919, sold to said Scholtz & Co. forty-five dozen baseballs and ten dozen baseball bats at the agreed price of $190.00, the said Scholtz & Co. agreeing to pay
7 therefor within ten days of delivery. Said baseballs and baseball bats were so purchased by said Scholtz & Co. with the sole purpose and intention of exporting the same from the United States to said Delgado & Cia in Venezuela, which fact was at all times known to Plaintiff; and said order from said Scholtz & Co. was accepted by the Plaintiff with the intention that said baseballs and baseball bats should forthwith be so exported as herein set forth. Said Scholtz & Co., in obedience to their instructions from said Delgado & Cia, instructed Plaintiff to mark the packages containing said baseballs and baseball bats with names and distinguishing marks, thus: D & C / S / "La Guaira," / #36 to indicate said purchaser and its locality in said Venezuela, and then to deliver said packages of said baseballs and baseball bats, so marked, into the custody of the Atlantic & Caribbean Steam Navigation Co., an exporting carrier, at the City of New York, in the State of New York. Pursuant to such instructions, Plaintiff marked the packages containing said baseballs and baseball bats with the aforementioned distinguishing marks and delivered the same into the custody of the said exporting carrier at the City of New York, in the State of New York, and obtained a receipt therefor from the agent of said exporting carrier, which receipt was transmitted by Plaintiff to said Scholtz & Co., and thereafter surrendered by the latter in exchange for signed export bill of lading issued by said Atlantic & Caribbean Steam Navigation Co., dated February 10, 1919, a copy of which export bill of lading is hereto annexed, marked "Exhibit C," and made a part hereof. Said baseballs and baseball bats were manufactured and produced by Plaintiff within the United States of America and at a time subsequent to October 4, 1917.

Under date of January 22, 1919, Plaintiff forwarded to said
8 Scholtz & Co. an invoice of said baseballs and baseball bats and said Scholtz & Co. made payment therefor on February 1, 1919. A copy of said invoice is attached hereto, marked "Ex-

hibit D," and made a part hereof. Said baseballs and baseball bats were duly transported by said exporting carrier, the Atlantic & Caribbean Steam Navigation Co., by the vessel "Maracaibo," to said La Guaira in said Venezuela, and were there delivered to said Delgado & Cia, on or about February 18, 1919.

Said Scholtz & Co. made said purchase in obedience to the instructions from said Delgado & Cia, and upon the agreement and understanding with said Delgado & Cia that said Scholtz & Co. were to receive from said Delgado & Cia as compensation for said services a commission upon the price at which said goods and commodities were so bought, and that said goods and commodities were to be bought by said Scholtz & Co. for the account and risk of said Delgado & Cia, said commission and the rate thereof being as usual theretofore in like trade under like circumstances. Said Delgado & Cia paid to said Scholtz & Co., as compensation for making such purchase and attending to the shipment thereof a commission of five per centum upon the purchase price from Plaintiff and upon marine freight charges, insurance and other similar items. Said Scholtz & Co. made payment to Plaintiff for said baseballs and baseball bats under agreement with said Delgado & Cia that said purchase should be made upon open account with the latter, and payment therefor made to said Scholtz & Co. within ninety days from date of shipment. Said payment was made within ninety days as agreed. The export bill of lading, marine insurance, and other shipping documents were taken out in the name of said Scholtz & Co. pursuant to instructions from said Delgado & Cia.

9 That with respect to the aforesaid facts said tax demanded by the Defendant and paid by the Plaintiff was a tax on the exportation of said goods and commodities and was a tax on exports and was in violation of the Constitution of the United States and was illegal, null and void.

Eighth. That said Commissioner of Internal Revenue on or about May 28, 1920, denied and rejected the aforesaid claim and application of the Plaintiff to remit and refund the said amount so collected from the Plaintiff. No part of the said amount has been remitted, refunded or repaid to this Plaintiff or to anyone for his account.

For a Second Cause of Action.

Ninth. The Plaintiff adopts and reiterates the first and second paragraphs of the first cause of action.

Tenth. That on or about the 31st day of March, 1919, the Defendant, acting as such Collector of Internal Revenue for the Second District of New York, and claiming to act under Section 600 of the Act of Congress approved October 3, 1917, known as the War Revenue Act of 1917, demanded of the Plaintiff the sum of five and 41/100 dollars ($5.41) which the Defendant claimed to be then due and payable from the Plaintiff as and for taxes due on the sales of certain goods and commodities which were manufactured or produced by the Plaintiff in the United States and sold by the Plaintiff

in the month of February, 1919, and threatened to enforce the payment of the said tax, together with penalties and interest provided by the laws of Congress.

Eleventh. That thereupon the Plaintiff did, on or about the 31st day of March, 1919, solely in order to prevent distraint and
10 sale of its property and upon compulsion and under duress and coercion, involuntarily paid to the Defendant as such Collector of Internal Revenue the said sum of five and 41/100 dollars ($5.41), and the Plaintiff at the time of payment protested to the Defendant in writing that no tax was due from the Plaintiff on said sale, and that the Defendant was without authority to exact or collect the sum or any part thereof.

Twelfth. Upon information and belief, that there was not on the 31st day of March, 1919, or at any other time, any sum due from the Plaintiff for or on account of any tax upon the said sale, and the Defendant as such Collector of Internal Revenue or otherwise was without authority to exact or collect the said sum of five and 41/100 dollars ($5.41).

Thirteenth. That, thereafter, and on or about the 20th day of April, 1920, the Plaintiff, in accordance with the provisions of law and regulations of the Treasury Department in such cases, made a claim and application in writing to the Commissioner of Internal Revenue and duly demanded the return and repayment to Plaintiff of the said sum so paid as aforesaid on the ground that said tax was erroneously and illegally assessed and collected, inasmuch as the said tax was assessed upon articles exported from the United States to a foreign country, in violation of the Constitution of the United States.

Fourteenth. That the facts with respect to the transactions upon which the above-mentioned tax was collected, are as follows:

1. Gath & Chaves, Ltd., a firm engaged in the mercantile business at Santiago, a city in Chile, a foreign country, under date of August 27, 1918, ordered The Warner Brothers Company, a corporation formed under the laws of Connecticut and engaged in the business of shipping and export commission merchants with offices at
11 225 Fifth Avenue, New York, N. Y., to purchase for their account and risk certain goods, wares and merchandise, including certain footballs, and to cause the same to be shipped to them at Valparaiso, a city in said Chile, a foreign country. A copy of said order is hereto annexed, marked "Exhibit E," and made a part hereof.

Pursuant to such order, said The Warner Brothers Company, on or about October 2, 1918, sent a written order to Plaintiff, A. G. Spalding & Bros., for said goods, wares and merchandise, including said footballs, a copy of which order is hereto annexed, marked "Exhibit F," and made a part hereof. Pursuant to said order from said The Warner Brothers Company the Plaintiff, on February 7, 1919, sold to said The Warner Brothers Company sixteen footballs at the agreed price of $106.40, the said The Warner Brothers Company

agreeing to pay therefor within ten days of delivery. Said footballs were so purchased by said The Warner Brothers Company with the sole purpose and intention of exporting the same from the United States to said Gath & Chaves, Ltd., in Chile, which fact was at all times known to Plaintiff; and said order from said The Warner Brothers Company was accepted by the Plaintiff with the intention that said footballs should forthwith be so exported as herein set forth. Said The Warner Brothers Company, in obedience to their instructions from said Gath & Chaves, Ltd., instructed Plaintiff to mark the packages containing said footballs with names and distinguishing

$$\frac{G \ \& \ CPS}{AGS \ \& \ B \quad Valparaiso}$$

marks, thus: to indicate said purchaser and its locality in said Chile and then to deliver said packages of said footballs so marked, into the custody of the Panama Railroad Steamship
12 Line, an exporting carrier, at the City of New York, in the State of New York. Pursuant to such instructions, Plaintiff marked the packages containing said footballs with the aforementioned distinguishing marks and delivered the same into the custody of the said exporting carrier, at the City of New York, in the State of New York, and obtained a receipt therefor from the agent of said exporting carrier, which receipt was transmitted by Plaintiff to said The Warner Brothers Company and thereafter surrendered by the latter in exchange for signed export bill of lading issued by said Panama Railroad Steamship Line, dated March 4, 1919, a copy of which export bill of lading is hereto annexed, marked "Exhibit G," and made a part hereof. Said footballs were manufactured and produced by Plaintiff within the United States of America and at a time subsequent to October 4, 1917. Under date of February 7, 1919, Plaintiff forwarded to said The Warner Brothers Company an invoice of said footballs and said The Warner Brothers Company made payment therefor on February 17, 1919. A copy of said invoice is attached hereto, marked "Exhibit H," and made a part hereof. Said footballs were duly transported by said exporting carrier, the Panama Railroad Steamship Line, and connecting carriers, to said Valparaiso, in said Chile, and arrived at that point about twenty-two days after shipment from New York, and were then and there delivered to said Gath & Chaves, Ltd.

Said The Warner Brothers Company made said purchase in obedience to the instructions from said Gath & Chaves, Ltd., and upon the agreement and understanding with said Gath & Chaves, Ltd. that said The Warner Brothers Company were to re-
13 ceive from said Gath & Chaves, Ltd., as compensation for said services a commission upon the price at which said goods and commodities were so bought, and that said goods and commodities were to be bought by said The Warner Brothers Company for the account and risk of said Gath & Chaves, Ltd., said commission and the rate thereof being as usual theretofore in like trade under like circumstances. Said Gath & Chaves, Ltd., paid to said The Warner Brothers Company as compensation for making such pur-

chase and attending to the shipment thereof a commission of three and one-half per centum upon the purchase price from plaintiff and upon marine freight charges, insurance, and other similar items. Said The Warner Brothers Company made payment to Plaintiff for said footballs under agreement with said Gath & Chaves, Ltd. that payment for said purchase should be made to said The Warner Brothers Company by said Gath & Chaves, Ltd. by means of a ninety day draft drawn by said The Warner Brothers Company against a confirmed letter of credit submitted by said Gath & Chaves, Ltd., and said payment was so made as agreed. The export bill of lading was taken out by L. S. Holzoff and Co., a firm of shipping and forwarding agents employed by the said The Warner Brothers Company to attend to the details of shipment.

2. Tominaga Shoten, a firm engaged in the mercantile business at Kobe, a city in Japan, a foreign country, under date of August 7, 1918, ordered Henry W. Peabody & Company, a firm of shipping and export commission merchants with offices at 17 State Street, New York, N. Y. to purchase for their account and risk certain goods, wares and merchandise, including certain baseball bats, and to cause the same to be shipped to it at said Kobe, in said Japan. A copy of said order is hereto annexed, marked "Exhibit I,"
14 and made a part hereof.

Pursuant to said order, said Henry W. Peabody & Company on or about September 4, 1918, sent a written order to the Plaintiff, A. G. Spalding & Bros., for said goods, wares and merchandise, including said baseball bats, a copy of which order is hereto annexed, marked "Exhibit J," and made a part hereof. Pursuant to said order from said Henry W. Peabody & Co. the Plaintiff, on February 21, 1919 sold to said Henry W. Peabody & Co. eight dozen baseball bats at the agreed price of $74.10, the said Henry W. Peabody & Co. agreeing to pay therefor within ten days of delivery. Said baseball bats were so purchased by said Henry W. Peabody & Co. with the sole purpose and intention of exporting the same from the United States to said Tominaga Shoten in Japan, which fact was at all times known to Plaintiff; and said order from said Henry W. Peabody & Co. was accepted by the Plaintiff with the intention that said baseball bats should forthwith be so exported as herein set forth. Said Henry W. Peabody & Co., in obedience to their instructions from said Tominaga Shoten, instructed Plaintiff to mark the packages containing said baseball bats with names and dis-
J. K.
tinguishing marks, thus: "109" to indicate said purchaser and its
Kobe
locality in said Japan, and then to deliver said packages of said baseball bats, so marked, into the custody of the American & Manchurian Line, an exporting carrier, at the City of New York, in the State of New York. Pursuant to such instructions, Plaintiff marked the packages containing said baseball bats with the aforementioned distinguishing marks and delivered the same into the custody of the said exporting carrier at the City of New York, in the State

of New York, and obtained a receipt therefor from the agent of said exporting carrier, which receipt was transmitted by Plain-
15 tiff to said Henry W. Peabody & Company, and thereafter surrendered by the latter in exchange for signed export bill of lading issued by said American & Manchurian Line, dated May 8, 1919, a copy of which export bill of lading is hereto annexed, marked "Exhibit K," and made a part hereof. Said baseball bats were manufactured and produced by Plaintiff within the United States of America and at a time subsequent to October 4, 1917. Under date of February 21, 1919, Plaintiff forwarded to said Henry W. Peabody & Company an invoice of said baseball bats, and said Henry W. Peabody & Co. made payment therefor in April 1919. A copy of said invoice is attached hereto, marked "Exhibit L," and made a part hereof. Said baseball bats were duly transported by said exporting carrier the American & Manchurian Line, by the steamship "Kansas," to said Kobe, in said Japan, and were there delivered to said Tominaga Shoten.

Said Henry W. Peabody & Company made said purchase in obedience to the instructions from said Tominaga Shoten and upon the agreement and understanding with said Tominaga Shoten that said Henry W. Peabody & Company were to receive from said Tominaga Shoten as compensation for said services a commission upon the price at which said foods and commodities were so bought, and that said goods and commodities were to be bought by said Henry W. Peabody & Company for the account and risk of said Tominaga Shoten, said commission and the rate thereof being as usual theretofore in like trade under like circumstances. Said Tominaga Shoten paid to said Henry W. Peabody & Co., as compensation for making such purchase and attending to the shipment thereof a commission of two and one-half per centum upon the purchase price from Plaintiff and upon marine freight charges,
16 insurance, and other similar items. Said Henry W. Peabody & Company made payment to Plaintiff for said baseball bats under agreement with said Tominaga Shoten that payment should be made to said Henry W. Peabody & Company by said Tominaga Shoten by means of a ninety day draft drawn by said Henry W. Peabody against a credit opened in New York by said Tominaga Shoten, said draft being accompanied by bill of lading and other shipping documents. Said payment was so made as agreed. The export bill of lading, marine insurance, and other shipping documents were taken out in the name of said Henry W. Peabody & Company, pursuant to instructions from said Tominaga Shoten.

3. That with respect to the aforesaid facts said tax demanded by the Defendant and paid by the Plaintiff was a tax on the exportation of said goods and commodities and was a tax on exports and was in violation of the Constitution of the United States and was illegal, null and void.

Fifteenth. That said Commissioner of Internal Revenue, on or about May 28, 1920, denied and rejected the aforesaid claim and application of the Plaintiff to remit and refund the said amount so collected from the Plaintiff. No part of the said amount has been remitted, refunded or repaid to this Plaintiff or to anyone for his account.

Wherefore, the Plaintiff demands judgment against the Defendant for the sum of eleven and 11/100 dollars ($11.11), with interest fro the 20th day of April, 1920, besides the costs of this action.

(Signed) LORD, DAY & LORD,
Attorneys for Plaintiff.

Office & P. O. Address, 25 Broadway, Borough of Manhattan, City of New York.

17 STATE OF NEW YORK,
County of New York, ss:

H. Boardman Spalding, being duly sworn, deposes as follows:

I am an officer of A. G. Spalding and Bros., the Plaintiff in the above-entitled action, to wit: the Vice President and Treasurer thereof; I have read the foregoing complaint and know the contents thereof, and the same is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters, I believe it to be true.

(Signed) H. BOARDMAN SPALDING.

Sworn to before me this 3rd day of November, 1921.
[SEAL.] JAMES G. PARSONS,
Notary Public, New York Co.

Clerk's No. 49.
New York County Register's No. 3018.
Commission expires March 30, 1923.

18 EXHIBIT A.

Copy of Order from Customers.

Nota de Pedido que Hacen los Señores Delgado & Cia, Caracas, á los Señores Scholtz & Co., de New York.

35 docenas Base-balls "Professional" No. 7 B.
10 docenas Base-balls "Junior League" No. 8.
12 docenas Base-ball Bats No. 50T.
6 docenas Base-ball Mitts No. E X.
2 docenas Base-ball Masks No. b.

Referencia: Factura de fecha, Octubre 21/18.
Manifestación consular, despacho, etc. lo mismo que en su factura del 21 de Octubre 1918.
Caracas: Noviembre 20 de 1918.

(Signed) DELGADO & CIA.

19 EXHIBIT B.

Export Order from Scholtz & Co., Shipping and Commission Merchants.

Telephone 7133 Hanover. 82 Wall Street,
New York, Dec. 10th, 1918.

To A. G. Spalding & Brother:

Please ship on or before the —— —, —— per steamer ——. Rush.

Important.—Separate Invoice required for each Mark.

In all cases prepay freight to New York. If your prices do not cover delivery to Steamer, charge the freight on invoices.

Gross weight of each package and separate net weight of each article must appear in your invoice.

Errors in weight often entail heavy fines in Foreign Custom Houses, therefore be careful when weighing and marking Goods, as we shall hold you responsible for any fines caused through your errors.

Cases or crates must be made to fit Goods as duty is paid by Gross weight.

Shipping mark and number to be put on packages.		
D x C	35 doz. Professional #7 B Base Balls.	
S	10 " Junior League #8 "	
La Guaira	12 " #50 T. Base Ball Bats.	
#36	as invoiced Oct. 15/18.	SCHOLTZ & CO.

Please send Memo. Invoice at once so we can apply for license and clear at Custom House.

20 EXHIBIT C.

Straight Bill of Lading.

Not Negotiable.

29. The Shipper, Vessel, Consignee, Designation and Goods Referred to overpage as mentioned or described on this side (back) hereof are as follows:

Shipper: Scholtz & Company.
Vessel: Maracaibo.
Destination of the Goods: La Guaira.
Expected to sail February 13, 1919, with privilege to substitute, transship and other privileges as hereinbefore provided.
Consignee: J. Boccardo & Cia.
B/L Number —.

Shipper's Description of Goods.

(Carrier's Responsibility for Description Being Limited as Hereinbefore Provided.)

Marks.	Numbers.	Quantities.	Packages and contents.	Shipper's weight.	U. S. Gov. license No.	Custom-house declaration No.
D x C S La Guaira.	36/38	3	Cases Baseball Supplies. Delgado & Cia.	260	3,935,929	10533,

For internal revenue purposes only.

SCHOLTZ & CO.

30. And finally in accepting this Bill of Lading the shipper, owner and consignee of the Goods and holder of this bill of lading agree to be bound by all its provisions, on this page and overpage, whether written, printed or stamped, as fully as if signed by all of them.

Surcharge 75%.

In witness whereof, The Atlantic & Caribbean Steam Navigation Co., by its Master or Agent of the vessel has signed this bill of lading.

Dated at New York Feb. 10, 1919.

ERNEST B. WEBBER,
Agent.

21 EXHIBIT D.

Copy Invoice from A. G. Spalding & Bros.

Mark: { D & C / S / La Guaira #36

Jan. 22, 1919.

Sold to Scholtz & Co., 82 Wall Street, New York City.

No. 3054. El 1673.

Case No. 36.

Gro. wgt. 222 lbs.
Net wgt. 171 lbs.
Meas. 36 x 29 x 18.

Lbs.		
164	35 dz. 7B Baseball 4.—	$140.—
7	6 dz. 8 Baseball 2.—	12.—
	7 dz. EX Mitts 1.40	9.80

Case No. 37.

Gro. Wgt. 10 lbs.
Net Wgt. 69 lbs.
Meas. 46 x 20 x 18.

24	34 EX Mitts 1.40	47.60
20	4 dz. 8 Balls 2.—	8.—
13	18 dz. Mask- 1.—	15.—

Case No. 38.

Gro. Wgt. 345 lbs.
Net. wgt. 280 lbs.
Meas. 42 x 26 x 22.

	10 dz. 50T Bats 4.—	40.—
		272.40
	5%	13.62
		258.78

22 EXHIBIT E.

The Chilian Stores,
Gath & Chaves,
Limited.
Departamento de Sport.
Santiago de Chile, 27 de Agosto de 1918.
1054.

Nota de Pedido a A. G. Spalding Bros., New York.

Plazo Contado.

No. W1024.

Condiciones, 5%, 2%.
Embarques 15/30 Diciembre de 1918. Embalaje.
Declaracion, ——, —, ——, Puerto.

		Articulo.	Valor, approximado, dollars.
	* * * * * * *		
L.	24	Pzas. Pelotas Foot-ball "Official Association," C/u. 7.00.....	168.00
G.	24	" Pelotas " " "Olympic Championship," C/u. 7.00..	168.00
	* * * * * * *		

Importe Aproximado: L 243.0.0.Dollars 1215.
Referencia: Pedido W. 854.

THE CHILIAN STORES (GATH Y CAVES), LTD.

J. M. P.

23 EXHIBIT F.

The Warner Brothers Company,
Foreign Purchasing Department,
225 Fifth Avenue.

New York, Oct. 2, 1918.

Messrs. A. G. Spalding Brothers,
126 Nassau Street,
New York City.

GENTLEMEN:

We take pleasure in sending to you enclosed, order #W1024 for account of The Chilean Stores (Gath & Chaves) Ltd., Santiago, Chile, and would draw your particular attention to the detailed shipping instructions on the attached slip as also to the following:

This order will be considered firm by us only after receipt of your advice that export license has been obtained from The War Trade Board, and in order to avoid delay in the despatch of the goods, we would suggest that you file application at least three weeks in advance of the expected delivery.

Kindly send the license immediately to Messrs. L. S. Holtzoff & Co., #55 Broadway, this City, our forwarding agents, with information as to just when the order will be ready, so as to enable them to make definite shipping arrangements.

Please also take note that Messrs. Gath & Chaves are a British Stock Co. that has been in existence for several years; this data to appear on the application for license.

Yours very truly,
THE WARNER BROTHERS CO., INC.,
FOREIGN PURCHASING DEPT.
J. P. LANGLEY.

C:JP.
encl.

P. S.—Please acknowledge receipt and oblige.

24 The Warner Brothers Company,
Foreign Purchasing Department.

Removed to 347 Madison Ave. (45th Street), New York City.

New York, Oct 17, 1918.

Messrs. A. G. Spalding & Bros.,
128 Nassau St.,
New York City.

GENTLEMEN:

Replying to your letter of Oct. 11th regarding our order W1024 for Chilean Stores (Gath & Chaves, Ltd.) Santiago, Chile, we are pleased to advise that we accept the prices mentioned therein.

The order may be entered for execution and we hope delivery will be effected as soon as possible.

Yours very truly,

THE WARNER BROTHERS CO., INC.,
FOREIGN PURCHASING DEPT.
J. P. LANGLEY.

L:JP.

25 EXHIBIT G.

Panama Rail Road Steamship Line.

Per S. S. Panama.
Shipper, L. S. Holtzoff & Co.
Consignee, Chilian Stores (Gath & Chaves), Limited
Destination, Valparaiso.
Routing, Pacific Steam Navigation Company.

Particulars of Shipment, Rates, and Charges.

Marks and numbers.	Packages and pieces. No.	Kind.	Goods as declared by shipper.	Weight.
G & CPS #1 A G S & B Valparaiso	1	Case	Sporting Goods (Gloves, Nets, Footballs, Hose).....	38 Kilos Gross.

Lic. #3,969,067.
Dec. #60,252.

Not Negotiable.

L. S. HOLTZOFF & CO.
MH.

This Bill of Lading issued for Internal Revenue purposes only. No other Copy has been issued.

In accepting this Bill of Lading, the Shipper, the owner and the Consignee of the goods and the Holder of the Bill of Lading agree to be bound by all of its stipulations and conditions, whether written printed or stamped, as fully as if they were all signed by such Shipper, Owner, Consignee or Holder, notwithstanding any local custom or regulation to the contrary.

In witness whereof, four Bills of Lading (exclusive of non-negotiable copies) all of this tenor and date, have been signed, one of which being accomplished, the other to stand void.

PANAMA RAIL ROAD COMPANY AND
CONNECTING CARRIERS,
Per M. HERMANN.

New York, March 4th, 1919.

26 EXHIBIT H.

All claims for damages or shortage must be made within five days from receipt of goods.

No. E 4374.

A. G. Spalding & Bros.,

124-128 Nassau Street.

Sold to Warner Bros. Co., Chilian Stores, Gath & Chaves, Madison Ave., N. Y. City.

New York Feb. 7, 1919.

1 B B 1 Glove	5.50
2 3 D Tennis Nets 7.50	15.00
16 G Foot Balls 7.00	112.00
18 Pr. G C Hose 36.00	54.00
	186.50
5%	9.33
	177.17

Case #1.
G W 84 lbs.
Net 37 "
Mark, G M P P S, A. G. S. & B, Valparaiso.

27 EXHIBIT I.

Copy.

Tominaga Shoten,

Kobe & Osaka.

No. 109. Kobe, August 7th, 1918.

To Messrs. Henry W. Peabody & Co.,
New York:

Article: Sporting goods.
A. G. Spalding & Bros.
Price: —.
Quantity: See Attached Sheet.
Assortment: As attached sheet.
Size: —.
Quality: Their Standard.
Packing: For export.
Shipping: Overland or per Steamer from New York but quickest.
Cordword: 109.
Remarks: ——.
Marks: <J, K, 109, Kobe.>

28 Copy.

Tominaga Shoten,
Kobe & Osaka,
Japan.

Kobe, August 7th, 1918.

Specification of Enquiry No. 109.

In Accordance with Spalding's Complete 1912 Trade List.

Page No.	Description.	Quantity.	Price.
10	"Player's Autograph" Bats, Assorted.....	5 doz.	$8.00 per d.
11	Special Model Bats, Assorted.....	3 "	8.00 " "
14	Professional Oil Finish Bats Assort-.....	2 "	8.00 " "

29 EXHIBIT J.

Export Order from Henry W. Peabody & Co., Oriental Department.

17 State Street.

Folio 244-J-7. New York, Sept. 4, 1918.

Mark: <J, K, 109, Kobe.>
Each package must be marked as above and be numbered consecutively commencing with 1—.

To A. G. Spaulding & Bros.,
126 Nassau Street, City:

Shipping Instructions.

Please Fill Out Enclosed Card and Mail Immediately.
Mail us gross wts. cubic measurements and point of origin of each case.
Notify us as soon as order is completed.
Do not Ship until Instructed.
The goods supplied on this order must be of American manufacture and your invoice must be certified thereto as follows:

I hereby certify that the above described articles are of the growth, product or manufacture of the United States, or its possessions, and that no drawback of import duties has been or will be claimed thereon, and that this invoice is true and correct in all particulars.

If any of the goods on this order should not comply with the above certificate they must be invoiced separately and designated foreign mdse.

Payment will not be made on uncertified invoices.
We must have five copies of your invoice.
Subject to execution in compliance with the conditions expressed on the reverse side of this sheet, please enter our order for the following goods.

In Accordance with the Spaulding's Complete 1912 Trade List.

Page No.	Description.	Quantity.	Price.
10	"Player's Autograph" Bats, assorted.....	5 doz.	9.60 per dz.
11	Special Model Bats, assorted.....	3 "	10.00 " "
14	Professional oil finish bats assort- #125P.....	2 "	9.60 " "

Subject to license being obtained.
This order subject to cancellation if action on the part of any Government should prohibit importation of these goods or prevent their being exported.
Subject to license being obtained.

HENRY W. PEABODY & CO.,
ORIENTAL DEPT.,
By POLHEMUS LYON.

30 EXHIBIT K.

The American & Manchurian Line,
Ellerman & Bucknall Steamship Co., Ltd.,
London,
A. & M.

For Dalny and Port Arthur and Ports in China, Japan, the Philippines, and Straits Settlements.

Ellerman & Bucknall Steamship Co., Ltd.,
5 and 6 Billiter Avenue, London, E. C.

Norton, Lilly & Co.,
General Agents,
New York City, N. Y.

Order notify Tominaga Shoten, Kobe, Japan.
J. K. J. K.
109. 391.
Kobe. Kobe.
Dec. #428,530. Dec. #—.
Not negotiable.
For internal revenue purposes only.
Prepaid.
Form No. 9.
Port of Destination, Kobe, Japan.

Received in apparent good order and condition from Henry W. Peabody & Co. to be transported by the good steamship Kansas to sail from the Port of New York, and bound for Far Eastern Port or Ports via Suez Canal or Panama Canal, or Cape of Good Hope, or otherwise, with liberty to substitute another steamer or steamers, or to trans-hip the goods before or after the commencement of the voyage by any other steamer or steamers and also with liberty to dry dock with or without cargo on board, to proceed to and stay at any ports or places whatsoever, although in a contrary direction to, or out of, the route to or beyond the port of discharge, once or oftener, in any order, backwards or forwards, for loading or discharging cargo, coal and passengers, or for any purpose whatsoever, and all such ports, places and sailings, shall be deemed to be included within the intended voyage (this liberty is not to be considered as restricted by any words in this contract whether written or printed).

	Gross weight.
Two (2) Cases Bats.....	296 lbs.

* * * * * * *

being marked and numbered as per margin, shipper's weight, (quality, quantity, contents, marks, gauge, weight and value unknown) and to be delivered subject to the exceptions and conditions hereinafter mentioned in like apparent good order and condition from ship's deck (where carrier's responsibility shall cease) subject to ship's engagements not hereby disclosed and though altering the voyage or involving a deviation therefrom, at the port of Kobe, Japan (or as near thereto as he may safely get) unto order of Order Notify or to his or their assigns. Freight for the said goods to be paid by the shippers in New York, on delivery of Bills of Lading, in cash without deduction.

31

* * * * * * *

Dated in New York this May 8, 1919.

NORTON, LILLY & CO.,
Agents,
Per J. B. TRAVERS.

32 EXHIBIT L.

E 4424.

A. G. Spalding & Bros.,
124–128 Nassau Street,
Export Department.

Cable Address: "Lochock, N .Y."
Terms: Net Thirty Days, Payable in New York Funds.
Mark: J, K, 109, Kobe.

New York, Feb. 21, 1919.

Sold to Henry W. Peabody & Co., 17 State St., New York City.

Your order No. LJ 244J7. No. 2118. Shipped by ——. No. E 4424.
Goods by mail at purchaser's risk only. All claims for damages or deficiency must be made within five days from receipt of goods.

Case No. 4.

Gro. wgt. 260 lbs.
Net wgt. 203 lbs.
Meas. 38 x 30 x 16.

52	125 Bats auto 9.60	41.60
36	Special bats 10.00	30.00

Case No. 5.

Gro. wt. 36 lbs.
Net wgt. 18 lbs.
Meas. 45 x 11 x 6.

8	125 Auto bats 9.60	6.40
		78.00
5%		3.90
		74.10

33 United States District Court, Southern District of New York.

L. 23–45.

A. G. SPALDING & BROS., Plaintiff,

against

WILLIAM H. EDWARDS, Collector of Internal Revenue for the Second District of New York, Defendant.

Demurrer.

The defendant above named by William Hayward, United States Attorney for the Southern District of New York, his attorney, de-

murs to the third amended complaint herein and to each and every alleged cause of action therein contained, on the ground that neither the third amended complaint nor any of the alleged causes of action therein states facts sufficient to constitute a cause of action.

Wherefore defendant demands judgment dismissing the third amended complaint together with the costs and disbursements of this action.

WILLIAM HAYWARD,
United States Attorney for the Southern District of New York, Attorney for Defendant.

Office and Post Office Address, United States Courts and Post Office Building, Borough of Manhattan, City of New York.

34 United States District Court, Southern District of New York.

L. 23–45.

A. G. SPALDING & BROS., Plaintiff,

against

WILLIAM H. EDWARDS, Collector of Internal Revenue for the Second District of New York, Defendant.

Please take notice that on the verified third amended complaint in the above entitled action and on the demurrer thereto, said demurrer will be brought on for trial as a litigated motion at a Stated Term of the District Court of the United States for the Southern District of New York, held at the Post Office Building, Borough of Manhattan, City of New York, on the 3rd day of March, 1922, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, and for such other, further and different relief as may be proper, with the costs of this motion.

Dated, February 25, 1922.

LORD, DAY & LORD,
Attorneys for Plaintiff.

Office & P. O. Address: 25 Broadway, New York City.

To: William Hayward, Esq., U. S. Attorney, Attorney for Defendant, Post Office Building, New York City.

35 United States District Court, Southern District of New York.

A. G. SPALDING & BROS., Plaintiff,

against

WILLIAM H. EDWARDS, Collector of Internal Revenue for the Second District of New York, Defendant.

Upon Demurrer to the Causes of Action Set Forth in Plaintiff's Third Amended Complaint.

Lord, Day & Lord (Franklin Grady, of Counsel), Attorneys for Plaintiff.

William Hayward, United States Attorney, (Richard S. Holmes, Ass't U. S. Attorney, and P. C. Alexander, Special Attorney, of Counsel), for Defendant.

KNOX, *D. J.*:

The complaint herein, containing three causes of action, was filed to recover the sum of $11.11, the amount of certain war excise taxes assessed and collected by defendant under the alleged authority of Section 600 of the Revenue Act of 1917. The tax was laid in respect of the sale by plaintiff of certain sporting goods for export to foreign customers. Each cause of action relates to a separate sale, and each exportation was had to a different country. Nevertheless, the facts are essentially similar, and one statement thereof will sufficiently indicate whether a good cause of action is set forth.

Delgado & Cia., a business firm at La Guaira, Venezuela, on November 20, 1918, ordered Scholtz & Co., a shipping and export commission house in this city, to purchase for their account and risk, a quantity of baseballs and baseball bats, manufactured within the United States by plaintiff, and to cause the same to be shipped to La Guaira. Scholtz & Co. purchased the merchandise from
36 plaintiff, agreeing to pay for the same within ten days. At the same time, plaintiff was instructed to mark the goods for shipment to Venezuela. This was accordingly done; the packages were delivered into the custody of Atlantic & Caribbean Steam Navigation Co., an exporting carrier, a receipt therefor being obtained by plaintiff. This was delivered to Scholtz & Co., which concern, in due course, exchanged the receipt for the carrier's export bill of lading, dated February 20, 1919.

Under date of January 22, 1919, plaintiff forwarded to Scholtz & Co. an invoice of the goods which was paid upon February 1, 1919.

For services performed Scholtz & Co. received a commission of five percentum of the amount of the purchase price, marine insurance, freight charges and other such items, from Delgado & Cia., upon whose open account, payable in ninety days, the purchase had been made.

Tax upon the sale having been assessed and demanded by defendant, the same was paid under protest, and to prevent distraint and sale of plaintiff's property. Thereafter, application for a refund was duly made by the plaintiff; and this, being of no avail, suit was instituted, as aforesaid.

The basis of the effort to recover is that the tax constitutes a burden upon exports, and is, in consequence, contrary to Article 1 of Section 9 of the Federal Constitution which reads:

"No tax or duty shall be laid on articles exported from any state."

The statute under which defendant assumed to act provides:

37 "Sec. 600. That there shall be levied, assessed, collected and paid

* * * * * * *

(*f*) Upon all tennis rackets, golf clubs, baseball bats, la crosse sticks, balls of all kinds, including baseballs * * * sold by the manufacturer, producer, or importer, a tax equivalent to three percentum of the price for which sold."

It is conceded that the tax is upon sales, and not upon the manufacture of the goods.

In support of its position, plaintiff argues that while the foreign journey or movement of the merchandise is one thing, and the buying and selling which occasions such movement is another thing, both are nevertheless parts of, and steps in, the export trade, and that each, therefore, constitutes a part of the process of exportation, and, as such, is free from taxation. In connection therewith, attention is called to the case of Dahnke-Walker Milling Co. v. Bondurant, decided by the Supreme Court upon December 12, 1921, where it was held that when goods are purchased in one state for transportation to another, the commerce therein includes the purchase quite as much as it does the transportation.

To this, the defendant replies that a distinction is to be made between tax on the exportation of articles, and a tax on a transaction in foreign or interstate commerce, saying, that Congress may, if it wishes, lay taxes upon transactions in foreign commerce so long as the act of exportation and its immediate incidents and instrumentalities are exempted therefrom.

A consideration of the numerous authorities cited by the respective parties has convinced me that defendant's demurrer, attacking the sufficiency of the complaint, must be sustained.

38 It may be, as argued, that had plaintiff, in pursuance of its sale, actually attended to the details of taking out the ocean bill of lading, upon the shipment to Delgado & Cia., and forwarded the same, with the draft attached, to its customer, the transaction would not be subject to tax. In that event, there would have been such a relationship between the successive steps of the process of exportation as to admit of but little question as to its nature.

Here, however, the sale was wholly made and consummated within the United States; the only part played by plaintiff in the actual export movement was that at the request of its purchaser it marked and delivered the goods to the steamship company. So far as plaintiff was concerned, the merchandise might have been removed from the carrier's custody by Scholtz & Co., and resold within the United States. The reason for this was that no actual export movement on the part of plaintiff was ever begun. And as Judge Hough said in this Court, in Peck v. Lowe, 234 Fed. 125, "Protection (from taxation) begins with the act of (exportation) and must end with its completion." The most that can be said of plaintiff's activities is that in selling the merchandise, and delivering the same to the carrier, it made the goods available for exportation by the purchaser.

The sales tax now under consideration was not imposed because the goods were to be sent abroad, but was levied upon all sales of goods of the same class, whether intended for use in the domestic or

foreign trade; and it is, I think, well within the reasoning employed by the Supreme Court in Peck v. Lowe, 247 U. S. 165.

39 It was there said, quoting from Thames & M. M. Ins. Co. v. United States, 237 U. S. 25:

"That where the tax is not laid on the articles themselves while in course of exportation, the true test of its validity is whether it 'so directly and closely' bears on 'the process of exporting' as to be in substance a tax on exportation. In this view of the case it has been held that the (constitutional) clause (above quoted) does not condemn or invalidate charges or taxes not laid upon property while being exported, merely because they affect exportation indirectly or remotely."

The tax upon the sales in question did nothing more than this, and while it is doubtless true that the line by which the beginning of an actual export movement is to be marked may, at times, be difficult to ascertain, and, of necessity, arbitrarily fixed, I am of the opinion that it is not for me to broaden the interpretation heretofore placed upon the constitutional provision by the Supreme Court. To sustain the plaintiff's contention would have that effect.

The demurrer interposed to each cause of action will be sustained, and plaintiff's complaint dismissed.

September 13, 1922.

____ ____,
U. S. D. J.

40 At a Stated Term of the United States District Court held in and for the Southern District of New York, in the United States Court House and Post Office Building, in the Borough of Manhattan, City, County, State, and Southern District of New York, on the 11th day of October, 1922.

Present: Honorable John C. Knox, District Judge.

A. G. SPALDING & BROS., Plaintiff,

against

WILLIAM H. EDWARDS, Collector of Internal Revenue for the Second District of New York, Defendant.

The issues of law raised by the demurrer of the defendant to the third amended complaint herein and each and every alleged cause of action therein contained having duly come on to be heard by this Court on the 31st day of March, 1922,

Now after hearing Richard S. Holmes, Special Assistant United States Attorney for the Southern District of New York, of counsel for the defendant, in support of said demurrer and Franklin Grady, Esq., of counsel for the plaintiff, in opposition thereto, and due deliberation having been had thereon, on motion of William Hay-

ward, United States Attorney for the Southern District of New York, attorney for defendant, it is

Ordered that the demurrer of the defendant to the third amended complaint herein and each and every alleged cause of action therein contained, be and it hereby is in all respects sustained, and it is

41 Further ordered that said third amended complaint be and it hereby is dismissed upon the merits and that the defendant have final judgment against the plaintiff dismissing said third amended complaint upon the merits and for his costs to be taxed.

JNO. C. KNOX,
U. S. D. J.

42 United States District Court, Southern District of New York.

A. G. SPALDING & BROS., Plaintiff,

vs.

WILLIAM H. EDWARDS, Collector of Internal Revenue for the Second District of New York, Defendant.

The issues of law raised by the demurrer of the defendant to the third amended complaint herein and to each and every alleged cause of action therein contained having duly come on to be heard before the Honorable John C. Knox, United States District Judge, at a Stated Term of this Court, held on the 31st day of March, 1922, and Richard S. Holmes, Special Assistant United States Attorney for the Southern District of New York, of counsel, for the defendant, having been heard in support of said demurrer, and Franklin Grady, Esquire, of counsel, for the plaintiff, having been heard in opposition thereto, and due deliberation having been had thereon, and the Court having handed down its opinion on the 13th day of September, 1922, sustaining said demurrer, and an order having been duly made and entered on the 11th day of October, 1922 sustaining said demurrer to the third amended complaint herein and to each and every alleged cause of action therein contained, and ordering that said third amended complaint be dismissed upon the merits and that defendant have final judgment against the plaintiff dismissing said third amended complaint upon the merits and for his costs to be taxed, and the costs of said defendant having been taxed in the sum of —

43 Now, on motion of William Hayward, United States Attorney for the Southern District of New York, attorney for defendant, it is

Adjudged, that the third amended complaint herein be, and it hereby is, dismissed upon the merits and that defendant have and recover of the plaintiff the sum of Twelve and 35/100 Dollars ($12.35), his costs as taxed, and that said defendant have execution against said plaintiff therefor.

Judgment signed this 18th day of October, 1922.

ALEX. GILCHRIST, JR.,
Clerk.

44 United States District Court for the Southern District of New York.

L. 23—45.

A. G. SPALDING & BROS., Plaintiff,

against

WILLIAM H. EDWARDS, Collector of Internal Revenue for the Second District of New York, Defendant.

Petition for Writ of Error.

The petition of A. G. Spalding & Bros., the Plaintiff herein, respectfully shows that on or about the 18th day of October, 1922, judgment was duly entered in this court in this cause in favor of the Defendant and against the Plaintiff dismissing the complaint, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this Plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this Plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States.

LORD, DAY & LORD,
Attorneys for Plaintiff.

FRANKLIN GRADY,
Counsel.

Filed October 28, 1922.

45 United States District Court for the Southern District of New York.

L. 23—45.

A. G. SPALDING & BROS., Plaintiff,

against

WILLIAM H. EDWARDS, Collector of Internal Revenue for the Second District of New York, Defendant.

Now comes the Plaintiff above named and files the following assignment of errors upon which it will rely on its appeal from the judgment entered on the 18th day of October, 1922.

First. That the Court erred in sustaining the demurrer to the first cause of action.

Second. That the Court erred in sustaining the demurrer to the second cause of action.

Third. That the Court erred in sustaining the demurrer to the thir cause of action.

Fourth. That the Court erred in holding that the Congress of the United States may tax a transaction in foreign commerce which involves a sale of goods for export from the United States to a foreign country.

Fifth. That the Court erred in holding that the goods which were sold by the Plaintiff to the agents of the foreign buyers, as set forth in the various causes of action, were not exports at the time the tax was laid or attached.

Sixth. That the Court erred in holding that the goods sold as set forth in the various causes of action were not in course of exportation at the time the tax was laid or attached.

46 Seventh. That the Court erred in holding that the sales of the goods mentioned in the various causes of action were wholly made and consummated in the United States, and were therefore subject to the sales tax.

Eighth. That the Court erred in holding that no actual export movement of the goods on the part of the Plaintiff was ever begun.

Ninth. That the Court erred in holding that the tax was not a tax on exports.

Tenth. That the Court erred in dismissing the complaint herein, and in entering a judgment to that effect.

Wherefore the Plaintiff-Appellant prays that the said judgment will be reversed and the demurrers to the several causes of action overruled, and for such other and further relief as to the Court may seem just and proper.

LORD, DAY & LORD,
Attorneys for Plaintiff.

Office & Post Office Address, 25 Broadway, New York City, Borough of Manhattan.

FRANKLIN GRADY,
Counsel.

Filed October 28, 1922.

47 *Statement as to Bond on Appeal.*

The plaintiff furnished a bond in the sum of $250., conditioned for the prosecution by it of the Writ of Error herein.
The surety on said bond is National Surety Company.

Said bond was approved on October 28, 1922 by the Hon. Learn Hand, D. J., and filed with the Clerk of the District Court of t United States for the Southern District of New York on Octob 28, 1922.

48 United States District Court for the Southern District of N York.

L. 23—45.

A. G. SPALDING & BROS., Plaintiff,

against

WILLIAM H. EDWARDS, Collector of Internal Revenue for the Seco District of New York, Defendant.

Order Allowing Writ of Error.

This — day of October, 1922 comes the Plaintiff by its attorne and files herein and presents to the Court its petition praying the allowance of writ of error and assignment of errors intend to be urged by it, praying also that a transcript of the record, p ceedings and papers upon which the judgment herein was render duly authenticated, may be sent to the Supreme Court of the Unit States, and that such other and further proceedings may be had are proper in the premises.

On consideration whereof the Court does allow the writ of er upon the plaintiff's giving bond according to law in the sum Two Hundred and Fifty Dollars ($250.00), which shall oper as a supersedeas bond.

L. HAND,
D. J.

Dated Oct. 28, 1922.

Filed October 30, 1922.

49 UNITED STATES OF AMERICA, *ss:*

To William H. Edwards, Greeting:

You are hereby cited and admonished to be and appear at Supreme Court of the United States to be holden at the City of Wa ington on the 27th day of November next, pursuant to a writ of er filed in the Clerk's Office of the District Court of the United St for the Southern District of New York, wherein A. G. Spalding Bros., a corporation, is Plaintiff, and you are Defendant in error show cause, if any there be, why the judgment rendered against said Plaintiff in error as in said writ of error mentioned should be corrected and speedy justice be done to the parties in that beh

Given under my hand at the City of New York, in the Dist

above named, this 28th day of October, in the year of Our Lord One Thousand Nine Hundred and Twenty-two.

L. HAND,
Judge of the District Court of the United States for the Southern District of New York.

Endorsed.

A copy of the within paper has been this day received at this office. Oct. 31, 1922.

WILLIAM HAYWARD,
U. S. Attorney.

Filed Oct. 31, 1922.

50 United States District Court, Southern District of New York.

A. G. SPALDING & BROS., Plaintiff in Error,

against

WILLIAM M. EDWARDS, Collector of Internal Revenue for the Second District of New York, Defendant in Error.

It is hereby stipulated and agreed that the foregoing pages, numbered 1 to 49 inclusive, contain a true and complete transcript of the record and proceedings had in the United States District Court for the Southern District of New York, in the cause of A. G. Spalding & Bros., Plaintiff in Error, against William H. Edwards, Collector of Internal Revenue for the Second District of New York, Defendant in Error, as the same remain of record and on file in the office of the Clerk of said court.

Dated, New York, November 20th, 1922.

LORD, DAY & LORD,
Attorneys for Plaintiff in Error.
WM. HAYWARD,
United States Attorney,
Attorney for Defendant in Error.

51 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the foregoing pages, numbered 1 to 50 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of A. G. Spalding & Bros., Plaintiff in error, against William H. Edwards, Collector of Internal Revenue for the Second District of New York, Defendant in error, as the same remain of record and on file in said office as agreed upon by the parties.

In testimony whereof I have caused the seal of said Court to be hereunto affixed at the City of New York, in the Southern District of New York, in the Second Circuit, this 20th day of November, in the year of our Lord One Thousand Nine Hundred and Twenty-two and of the Independence of the United States the One Hundred Forty-Seventh.

[Seal of District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

Endorsed on cover: File No. 29,260. S. New York D. C. U. S. Term No. 710. A. G. Spalding & Bros., plaintiff in error, vs. William H. Edwards, collector of internal revenue for the second district of New York. Filed November 24th, 1922. File No. 29,260.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

A. G. SPALDING & BROS., PLAINTIFF IN error, *v.* WILLIAM H. EDWARDS, COLLECTOR OF Internal Revenue for the Second District of New York, defendant in error.	No. 710.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

Comes now the Solicitor General and moves the Court to advance this case for hearing at an early date during the present term.

Plaintiff in error (hereafter called plaintiff) brought suit against the Collector to recover the amount of war excise taxes assessed and collected, under protest, upon the sale of a quantity of baseballs and baseball bats. The taxes were levied pursuant to Section 600 of the War Revenue Act of October 3, 1917 (40 Stat. 316), which provides as follows:

> That there shall be levied, assessed, collected and paid—
>
> * * * * *

> (f) Upon all tennis rackets, golf clubs, baseball bats, lacrosse sticks, balls of all kinds, including baseballs * * * sold by the manufacturer, producer, or importer, a tax equivalent to three per centum of the price for which so sold; * * *.

Delgado & Cia., a firm at La Guaira, Venezuela, ordered Scholtz & Co., a shipping and export commission house at New York City, to purchase for their account and risk the above mentioned goods, and to cause the same to be shipped to La Guaira. The goods were purchased from plaintiff, who was instructed to mark them for shipment to Venezuela. This was done and the packages were delivered into the custody of the Atlantic and Caribbean Steam Navigation Co., an exporting carrier, a receipt being obtained and delivered to Scholtz & Co., which concern exchanged the receipt for the carrier's export bill of lading. Scholtz & Co. was paid a commission for services, and reimbursed for all expenses.

The plaintiff claimed that the tax constitutes a burden upon exports, and is, in consequence, contrary to Section 9 of Article I of the Federal Constitution providing that "No tax or duty shall be laid on articles exported from any State." In support of its contention plaintiff argued that the buying and selling of goods for shipment abroad is so interwoven with the actual exporting that it constitutes a part of the process of exportation, and, as such, is free from taxation.

The Government claimed, and the District Court held, in sustaining the demurrer to the complaint, that the Act applied to all sales of the goods enumerated, whether intended for use in the domestic or foreign trade, and that the tax was imposed upon the sale of the goods and not upon the exportation thereof.

The case involves the application of a revenue statute and presents a question of importance to exporting interests. The Government also is deeply interested in the question, in that an early decision would aid materially in the administration of the internal revenue laws. It is, therefore, important that an early hearing be had.

This application is made on behalf of the Government and also at the instance of opposing counsel.

JAMES M. BECK,
Solicitor General.

JANUARY, 1923.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

A. D. SELLING & BROS.,

Plaintiff in Error,

vs.

WILLIAM H. EDWARDS, Collector of Internal Revenue, Second District of New York,

Defendant in Error.

In Error to the Supreme Court of the United States for the Southern District of New York.

BRIEF FOR PLAINTIFF-IN-ERROR.

FREDERICK STRAUS,

Attorney for Plaintiff-in-Error.

GEORGE DAVIS, Jr.,

Of Counsel.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1922.

No. 710.

A. G. SPALDING & BROS.,
Plaintiff-in-Error,

vs.

WILLIAM H. EDWARDS, Collector of Internal Revenue for the Second District of New York,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The questions involved come to this court upon a writ of error to the District Court of the United States for the Southern District of New York (Record, pp. 28, 29). The plaintiff in error is a New Jersey

corporation which has its principal place of business in the city of New York, State of New York; and is engaged in the manufacture and sale of athletic goods, etc. The complaint contains three causes of action, each of which relates to a separate sale by the plaintiff in error to an export commission house for exportation from the United States, to fill an order which had been received from a foreign country by the export commission house, of goods manufactured by the plaintiff, and the taxation of the goods so sold and in due course exported as intended to the foreign buyers from whom the orders originated.

The complaint, with the accompanying exhibits, states in detail the facts surrounding each such sale. These facts are essentially similar in each cause of action, and may be briefly summarized as follows:

At various dates in 1918, certain firms engaged in mercantile business in foreign countries sent to certain shipping and export commission houses in New York orders to purchase, for the account and risk of said foreign mercantile firms, certain goods, wares and merchandise manufactured by the plaintiff in error, and to cause said merchandise to be exported and shipped to said foreign mercantile firms, under distinguishing marks, and to the foreign consignees and destinations as specified in the orders from these foreign firms. Pursuant to said orders from the foreign mercantile firms, said shipping and export commission houses in New York sent written orders to the plaintiff in error for the goods, wares and merchandise so ordered by

said foreign firms and manufactured by the plaintiff in error, which written orders to the plaintiff in error declared that the merchandise was ordered for export and directed that the goods should be packed for transportation to the foreign destinations as specified, and the packages marked with distinguishing marks as specified, to indicate said foreign destinations and the consignees there, and that the goods, so packed and marked, should then be delivered by the plaintiff in error into the custody of ocean or export steamship carriers, as specified, for transportation to the foreign ports and consignees. The plaintiff in error accordingly, in obedience to these instructions, with knowledge that the goods were to be shipped to meet orders originating in the foreign countries, and that the export commission houses ordering the goods did so, in their accustomed method of trade, according to orders from their principals and customers abroad, packed and marked the merchandise as directed, and delivered the goods, so packed and marked, at the docks and into the custody of the exporting carriers as designated, which were ocean steamship companies, and received from these exporting carriers written receipts, acknowledging the receipt of the goods for transportation to the foreign destinations as specified, which receipts were thereupon delivered by the plaintiff in error to the said export commission houses, who in due course exchanged said receipts for the ocean carriers' export bills of lading, and the goods in question were thereupon exported and carried to the foreign consignees.

For their services performed in pursuance of the orders received from the foreign buyers, the export commission houses in New York received commissions on the amounts of the purchase price, marine insurance, freight charges, and other items, from the foreign mercantile firms who ordered the goods and for whose account and risk the purchases from the plaintiff in error were made. The invoices of the plaintiff in error to the export commission houses, for the goods so sold and delivered to the exporting carriers for export, included the amounts of the tax imposed under the provisions of Section 600 of the Revenue Act of 1917, and the export commission houses paid these taxes in their payment of the invoices from the plaintiff in error; and the taxes so paid necessarily fell upon the articles as so bought for export and exported by the export commission houses, and became items in the amounts of the purchase price of the goods and other charges as aforesaid, which were paid with the payment of the invoices from the export commission houses to the foreign buyers from whom the orders originated and came to the export commission houses.

By reason of said sales and deliveries by the plaintiff in error, the defendant in error, at various dates in 1919, claiming to act under the provisions of Section 600 of the Act of Congress approved October 3, 1917, known as the War Revenue Act of 1917, assessed upon and demanded from the plaintiff in error the taxes imposed, under the provisions of that section, upon the

articles therein enumerated which had been sold by the plaintiff in error, as aforesaid, for export, upon such export orders received by the plaintiff in error from said export commission houses, and which articles had been delivered by the plaintiff in error, in pursuance of the directions of said orders, into the custody of the exporting carriers at the docks, and exported as aforesaid. Thereupon the plaintiff in error, under protest and duress and in order to prevent distraint and sale of its property, paid such taxes so assessed and demanded by the defendant-in-error. Thereafter, on or about April 20, 1920, the plaintiff in error made to the Commissioner of Internal Revenue a claim for refund of the taxes so paid under protest, as aforesaid, on the ground that said taxes were erroneously and illegally assessed and collected, inasmuch as the taxes were assessed upon articles exported from the United States to foreign countries in violation of the provisions of Section 9 of Article I of the Constitution of the United States, which declares that "no tax or duty shall be laid on articles exported from any State". On or about May 28, 1920, the said Commissioner of Internal Revenue denied and rejected the aforesaid claim and application of the plaintiff in error; and no part of the said taxes has been refunded, remitted or repaid.

The plaintiff in error thereupon sued the defendant-in-error in the District Court for the recovery of the amount paid, upon the ground that the assessment was in violation of Section 9 of Article I of the Constitution

of the United States (Complaint appears in the Record, pp. 2-20). The defendant demurred to the complaint and to every cause of action therein contained, and demanded judgment dismissing the complaint (Record, pp. 20, 21).

The motion to dismiss the complaint was sustained by the District Court. The opinion of the District Court appears in the Record at pages 22 to 24.

Assignment of Errors.

The errors assigned are:

FIRST: That the Court erred in sustaining the demurrer to the first cause of action.

SECOND: That the Court erred in sustaining the demurrer to the second cause of action.

THIRD: That the Court erred in sustaining the demurrer to the third cause of action.

FOURTH: That the Court erred in holding that the Congress of the United States may tax a transaction in foreign commerce which involves a sale of goods for export from the United States to a foreign country.

FIFTH: That the Court erred in holding that the goods which were sold by the plaintiff to the agents

of the foreign buyers, as set forth in the various causes of action, were not exports at the time the tax was laid or attached.

SIXTH: That the Court erred in holding that the goods sold as set forth in the various causes of action were not in course of exportation at the time the tax was laid or attached.

SEVENTH: That the Court erred in holding that the sales of the goods mentioned in the various causes of action were wholly made and consummated in the United States, and were therefore subject to the sales tax.

EIGHTH: That the Court erred in holding that no actual export movement of the goods on the part of the plaintiff was ever begun.

NINTH: That the Court erred in holding that the tax was not a tax on exports.

TENTH: That the Court erred in dismissing the complaint herein, and in entering a judgment to that effect.

The foregoing assignments of error amount substantially to the single contention that the lower court should have denied the motion to dismiss the complaint and should have made an order overruling the demurrer.

Contention of Plaintiff in Error.

The taxes, for the recovery of which this action was brought, were taxes upon the articles themselves in course of exportation. As such, they were taxes upon exports and prohibited by Clause 5, Section 9, Article 1, of the Constitution of the United States, which provides that "no tax or duty shall be laid on articles exported from any State".

Outline of Argument.

First.

The tax was upon the articles themselves, when and as sold by the plaintiff in error; the articles were in course of exportation when so sold and delivered, and when the tax became due and was assessed; and the assessment and collection of the tax were in violation of the provisions of the Constitution of the United States, and were illegal, null and void.

Second.

The sales by the plaintiff in error were sales in foreign commerce, and were not taxable.

FIRST.

The tax was upon the articles themselves, when and as sold by the plaintiff in error; the articles were in course of exportation when so sold and delivered, and when the tax became due and was assessed; and the assessment and collection of the tax were in violation of the provisions of the Constitution of the United States, and were illegal, null and void.

The law under which the defendant in error claimed to act in assessing and collecting the said taxes from the plaintiff in error (Section 600 of the Act of Congress approved October 3, 1917) is as follows:

> "Sec. 600. That there shall be levied, assessed, collected, and paid——
>
> * * * * * *
>
> (*f*) Upon all tennis rackets, golf clubs, baseball bats, lacrosse sticks, balls of all kinds, including baseballs, foot balls, tennis, golf, lacrosse, billiard and pool balls, * * * sold by the manufacturer, producer, or importer, a tax equivalent to three per centum of the price for which so sold."

By the terms of the law, this gross tax was directly upon the articles themselves and accrued or became due on the completion of the sale by the manufacturer.

In William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (247 U. S. 165), this Court clearly defined the extent to which Art. 1, Sec. 9, par. 5, providing that "no tax or duty shall be laid on articles exported from

any state", qualifies and restricts the taxing power of Congress. The Court said:

> "The Constitution broadly empowers Congress not only 'to lay and collect taxes, duties, imposts and excises', but also 'to regulate commerce with foreign nations'. So, if the prohibitory clause invoked by the plaintiff be not in the way, Congress undoubtedly has power to lay and collect such a tax as is here in question. That clause says 'No tax or duty shall be laid on articles exported from any State'. Of course it qualifies and restricts the power to tax as broadly conferred. But to what extent? The decisions of this court answer that it excepts from the range of that power *articles in course of exportation*, Turpin *v.* Burgess, 117 U. S. 504, 507; the act or occupation of exporting, Brown *v.* Maryland, 12 Wheat. 419, 445; bills of lading for articles being exported, Fairbank *v.* United States, 181 U. S. 283; charter parties for the carriage of cargoes from state to foreign ports, United States *v.* Hvoslef, 237 U. S. 1; and policies of marine insurance on articles being exported,—such insurance being uniformly regarded as 'an integral part of the exportation' and the policy as 'one of the ordinary shipping documents', Thames and Mersey Ins. Co. *v.* United States, 237 U. S. 19. In short, the court has interpreted the clause as meaning that exportation must be free from taxation, and therefore as requiring 'not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation'. Fairbank *v.* United States, *supra*, pp. 292-293. And the court has indicated that where the tax is not laid on the articles them-

selves while in course of exportation the true test of its validity is whether it 'so directly and closely' bears on the 'process of exporting' as to be in substance a tax on the exportation. Thames and Mersey Ins. Co. *v.* United States, *supra*, p. 25." (The italics are ours.)

In Turpin *v.* Burgess (117 U. S. 504), this Court said:

"* * * Now the constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State. In the one case the words are, 'No tax or duty shall be laid on articles exported from any State'. Art. I, Sec. 9, par. 5. In the other they are: 'No State shall, without the consent of Congress, lay any imposts or duties on imports or exports'. Art. I, Sec. 10, par. 2. The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation, or intended exportation, or while they are being exported. That would be laying a tax or duty on exports, or on articles exported within the meaning of the Constitution. But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition."

This Court has not only made it clear that articles in course of exportation cannot be taxed, but has also repeatedly stated when articles are to be considered in course of exportation, and has declared

that articles are in course of exportation when they have been delivered into the custody of a carrier for transportation to the exporter at port of export.

In Railroad Commission *v.* Texas & P. R. Co. (229 U. S. 336), this Court very clearly defined that which constitutes goods in course of exportation, and said (on pp. 339-342):

> "In March, 1905, a shipper delivered to the Kansas City Southern Railway Company at Leesville, Louisiana, on its line of road, three carloads of tank staves, which were loaded in cars of the Texas & Pacific Railway Company to be transported to a named consignee at New Orleans. The rate established by the state railroad commission was 10 cents per hundred pounds; the interstate rate filed with the Interstate Commerce Commission was 15 cents per hundred pounds. The staves were hauled to Shreveport, Louisiana, and there delivered to the Texas & Pacific Railway Company, which hauled them to New Orleans. The customary notice of their arrival was given to the consignee, and they were directed by him to be delivered to a particular steamship, to which they were delivered, being switched to the lines of two other carriers and transported to Hamburg. The Texas & Pacific Railway Company collected freight charges thereon from the consignee at 15 cents per hundred pounds. The consignee at the date of the shipment of the freight resided at New Orleans and was engaged in the business of shipping broker in negotiating for cargo space, routes, and attending to shipments for consignors in the United States. The con-

signees of the eighteen carloads of logs and staves were engaged at New Orleans in the business of exporting staves to foreign countries; the staves they deal in are not treated, manufactured, or changed from the original shape in which they are received at New Orleans for export, and 98 per cent. of the shipments by them at New Orleans are exported to foreign countries. * * * *The shipments were in the physical custody of the railroad company until arrival at New Orleans, and thereafter in the physical custody of the steamships, which issued bills of lading therefor to the shippers of the cargo.*

The bills of lading in each instance provided for the delivery of freight from the initial point to New Orleans, there to be delivered to the shipper or consignee's order. But, notwithstanding this, the staves and logs were intended by the shippers to be exported to foreign countries, and were treated by both the shippers and the carriers accordingly, the shippers always holding the cars on the railroad track until they could accumulate cargo to fill their export orders and arrange for transportation. * * *

The sole question in the case is whether the shipments were foreign or intrastate commerce; or, speaking more accurately, whether they were within Federal or state jurisdiction. The circuit court and the circuit court of appeals both decided, as we have seen, that they were within Federal jurisdiction.

Appellants attack the conclusion and rely on, as the master relied on, the case of Gulf, C. & S. F. R. Co. *v.* Texas, *supra.* The argument is that the

service rendered by the railroad companies was wholly within the state and had 'no contractual or necessary relation to foreign transportation'. It was, it is argued, 'manifestly preliminary thereto, independently contracted for, and not necessarily connected therewith'. And the principle is urged that 'locality, therefore, determines the jurisdiction (separation between Federal power and state power) unless it is shown that though the local movement is actually within, it is legally outside the state'. To make the movement within legally outside of the state, appellants insist there must be bills of lading and other means of connection between the railroads and the ocean carriers. To make application of this principle, it is contended that 'not a single fact appears or exists, physical or other, which connects the railroads with the ocean carrier', and that the intention of the shippers or consignees is made absolutely controlling.

To the principle urged, so far as its applicability to the case at bar is concerned, we may oppose Southern Pacific Terminal Co. *v.* Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; Railroad Commission *v.* Worthington, 225 U. S. 101, 56 L. ed. 1001, 32 Sup. Ct. Rep. 657, and Texas & N. O. R. Co. *v.* Sabine Tram Co., 227 U. S. 111, *ante*, 442, 33 Sup. Ct. Rep. 229.

In those cases there was necessarily a local movement of freight, and it necessarily terminated at the seaboard. But it was decided that its character and continuity as a movement in foreign commerce did not terminate, nor was it affected by being transported on local bills of lading. The

principle enunciated in the cases were that it is the essential character of the commerce, not the accident of local or through bills of lading, which determines Federal or state control over it. *And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country.* The facts of the case at bar bring it within the ruling. The staves and logs were intended by the shippers to be exported to foreign countries, and there was no interruption of their transportation to their destination except what was necessary for transshipment at New Orleans." (The italics are ours.)

In Texas & N. O. R. Co. *v.* Sabine Tram Co. (227 U. S. 111), referred to in the above citation, the question was whether a shipment of lumber sold by a manufacturer to an exporter located at port of export within the same state constituted a transaction in foreign or intrastate commerce. W. A. Powell & Company were engaged in the business of buying and exporting lumber from points in Texas. Having made contracts of sale for future delivery in Europe they purchased lumber from the Sabine Tram Company, at Ruliff, Texas, to fill the contracts. The lumber was shipped on their order to the port of exportation under contract of affreightment made by the Sabine Tram Company. It was delivered in cars at the port of exportation into the custody of Powell & Company, and by an order of their agent the cars were moved from the railroad station to the dock and the lumber laden on the export ves-

sels. The Sabine Tram Company contended that the lumber was shipped in intrastate commerce, and that the rates fixed by the Railroad Commission of Texas for such freight should apply. The railroad carrier insisted that the rates fixed by the Interstate Commerce Commission should apply. This Court held that the transportation was in foreign commerce, and in disposing of the contention of the Sabine Tram Co. made it clear, as in Railroad Commission *v.* Texas & P. R. Co. (*supra*), that the lumber was in course of exportation from the time it was delivered to the carrier at Ruliff, Texas.

This Court said (on page 126):

> "It is said, however, that the Sabine Company had no connection with the lumber after its arrival at Sabine, and had no concern with its destination after it came into the hands of Powell Company, and had no particular knowledge thereof. Like circumstances undoubtedly existed in Southern P. Terminal Co. *v.* Interstate Commerce Commission. It did not prevail there and cannot prevail here. The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle, and means will be afforded of evading the national

control of foreign commerce from points in the interior of the State. There must be transshipment at the seaboard; and if that may be made the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character though it be essentially foreign."

And (on page 123) the Court said:

"The shipments having the character of foreign commerce when they passed 'out through the port of Sabine', when did they acquire it? We have had occasion to express at what point of time a shipment of goods may be ascribed to interstate or foreign commerce, and decided it to be when the goods have actually started for their destination in another state or to a foreign country, or delivered to a carrier for transportation. Coe *v.* Errol, 116 U. S. 517; Southern P. Terminal Co. *v.* Interstate Commerce Commission, 219 U. S. 498, 527."

It is, of course, absolutely clear from these cited decisions that if the goods had not been pronounced by this Court to have been in course of exportation at the time of the delivery to the carrier by the seller, the lower freight rates established by the State railroad commissions would have been applied to such transportation to the exporter at the seaboard, rather than the higher rates fixed by the Interstate Commerce Commission.

It will be noted that in both of the cases cited above this Court dealt with a situation like that which is involved in the case at bar. The exporters in those cases correspond to the exporters in our case. The manufac-

turer of the lumber corresponds to the plaintiff-in-error in our case. Just as it has been said in our case, that the plaintiff-in-error had no concern as to the disposition of the goods after delivery of the goods at the dock in the custody of the exporting vessel and delivery of the receipts to the exporters, so it was maintained in the cases cited that the manufacturers had no connection with the lumber after its arrival at the port of export, and had no concern with its destination after it came into the hands of the exporters. Nevertheless, under the rule laid down by this Court, the goods entered foreign commerce and were in course of exportation at the time they were delivered to the carriers for transportation to the exporters at the port of export; and hence in the case of the plaintiff-in-error the goods were in course of exportation, under the decisions of this Court, at the time when they started from the warehouse of the plaintiff-in-error in the conveyances which transported them to the exporting vessels.

The ground on which the District Court sustained the demurrer of the Government in the case of the plaintiff-in-error is stated in the following citation from its opinion:

> "It may be, as argued, that had plaintiff, in pursuance of its sale, actually attended to the details of taking out the ocean bill-of-lading, upon the shipment to Delgado & Cia., and forwarded the same, with the draft attached, to its customer, the transaction would not be subject to tax. In that

event, there would have been such a relationship between the successive steps of the process of exportation as to admit of but little question as to its nature.

"Here, however, the sale was wholly made and consummated within the United States; the only part played by plaintiff in the actual export movement was that at the request of its purchaser it marked and delivered the goods to the steamship company. So far as plaintiff was concerned, the merchandise might have been removed from the carrier's custody by Scholtz & Co., and resold within the United States. The reason for this was that no actual export movement on the part of plaintiff was ever begun. And as Judge Hough said in this Court, in Peck *v.* Lowe, 234 Fed. 125, 'Protection (from taxation) begins with the act of (exportation) and must end with its completion.' The most that can be said of plaintiff's activities is that in selling the merchandise, and delivering the same to the carrier, it made the goods available for exportation by the purchaser."

It is to be noted that the reasoning of the District Court is a repetition of the argument advanced in Railroad Commission *v.* Texas & P. R. Co. (*supra*) by counsel for the Commission, and in Texas & N. O. R. Co. *v.* Sabine Tram Co. (*supra*) by counsel for Sabine Tram Co., especially as to the assertion that the sale was wholly consummated within the United States; that ocean bills-of-lading were not taken out by the

plaintiff-in-error; and that no actual export movement on the part of the plaintiff-in-error was ever begun; and that this reasoning was completely overruled by this Court in both cases.

As to the remark of the District Court that "so far as plaintiff was concerned the merchandise might have been removed from the carrier's custody by Scholtz & Co. and resold within the United States", it is sufficient to say that, with certain exceptions, Congress in imposing internal revenue taxes on articles of commerce has always exempted from tax articles sold for export when exported under regulations prescribed by the Commissioner of Internal Revenue; and such regulations have invariably required satisfactory proofs of exportation. Where the tax had been illegally or erroneously collected, proofs of exportation as prescribed by the Commissioner of Internal Revenue have likewise been required from taxpayers who filed claims for refund of such tax.

The Revenue Act of 1918 imposed (in Section 900 of Title IX) a tax like that which is dealt with in our case, on a number of articles when "sold or leased by the manufacturer, producer or importer"; and this Act contained the following provision (Section 1310, paragraph (*c*)):

> "Under such rules and regulations as the Commissioner with the approval of the Secretary may prescribe, the taxes imposed under the provisions of Titles VI, VII or IX shall not apply in respect

> to articles sold or leased for export and in due course so exported. Under such rules and regulations the amount of any internal-revenue tax erroneously or illegally collected in respect to exported articles may be refunded to the exporter of the article, instead of to the manufacturer, if the manufacturer waives any claim for the amount so to be refunded."

The Revenue Act of 1921 imposed (in Section 900 of Title IX) a similar tax on a number of articles when "sold or leased by the manufacturer, producer, or importer" and contained an exempting provision exactly in terms as above.

It is to be noted that the sections quoted above from the Acts of 1918 and 1921 provide that the tax "shall not apply in respect to articles sold or leased for export and in due course so exported". That is to say, that in conformity with the decisions of this Court the tax shall not apply to articles in course of exportation.

The Revenue Act of 1917 contained two sections imposing gross taxes affecting articles exported, viz., Section 500 imposing a tax on the amounts charged for the transportation of property within the United States, and Section 600 imposing a tax on certain articles when sold by manufacturers, which is the tax dealt with in the case of the plaintiff-in-error. The application of both of these taxes to articles in course of exportation was considered in four opinions by the Attorney Gen-

eral, which are here submitted in full, as they constitute an important part of the history of this case.

(31 Op. Atty. Gen. 239.)

"DEPARTMENT OF JUSTICE,
MARCH 12, 1918.

SIR: I have the honor to acknowledge your letter of the 27th ultimo requesting my opinion on the proper construction of certain portions of section 500 of the war revenue act of October 3, 1917, 40 Stat. 300, 314.

That section, in so far as material to your inquiry, provides:

'There shall be levied, assessed, collected, and paid (*a*) a tax equivalent to three per centum of the amount paid for the transportation by rail or water * * * of property by freight consigned from one point in the United States to another: * * *'

Section 501 of the act provides:

'That the taxes imposed by section 500 shall be paid by the person, corporation, partnership, or association paying for the services or facilities rendered.'

For the purpose of promulgating proper regulations for the assessment and collection of the taxes imposed by section 500, you make the following specific inquiries:

'1. In view of the provision of Article I, section 9 of the Constitution that "no tax or duty shall be laid on articles exported from any

State", may the tax imposed by section 500 of the act be held to apply to the transportation of "property by freight consigned from one point in the United States to another" when that property is moving in the course of exportation?

'2. If the tax imposed by section 500 can not in view of the constitutional prohibition be held to apply to the transportation of property by freight consigned when such property is moving in the course of exportation, what is the test as to whether or not such property is in the course of exportation? Is the test solely whether the property is moving upon a through bill of lading or other shipping document covering the exportation, or is it sufficient to establish its export character that the property is being moved for export, even though it is shipped upon a local bill of lading?'

1. The tax levied by section 500, *supra,* is directly upon the freight, that is, upon the price paid for the carriage of the goods, and the burden of it falls on the consignor or consignee. It is therefore without question a tax or duty on the transportation itself, and, looked at merely from the point of view of its incidence as a tax, it does not apparently differ, in its legal aspect, from a tax on the bill of lading, on the warehouse receipt, on the charter party, on the manifest, or on the policy of marine insurance, all of which have been held to be a tax on articles exported within the meaning of the Constitution (Fairbank *v.* U. S. 181 U. S. 283; N. Y. & Cuba Mail S. S. Co. *v.* U. S. 125 Fed. 320, 200 U. S. 488, 491; Selliger *v.* Kentucky, 213 U. S. 200, 207; U. S. *v.* Hvoslef,

237 U. S. 1; Thames & Mersey Marine Ins. Co. *v.* U. S., 237 U. S. 19). Indeed, insofar as the mere incidence of the tax is concerned, the matter seems to be settled by U. S. *v.* Hvoslef, *supra*, for the charter parties in that case were described by the Supreme Court as 'in contemplation of law a mere contract of affreightment' (p. 16). In Thames and Mersey M. Ins. Co. *v.* U. S., *supra*, it is clearly implied on page 27 of the opinion that a tax or duty on freight would be a tax on the articles themselves.

In the cases cited above, the tax was directly upon transactions connected with the very act of exportation, while in the present case the tax is laid only on the transportation within the United States. It can not be regarded as a tax laid upon the shipments as exports or by reason or because of their exportation (Coe *v.* Errol, 116 U. S. 517, 525, 526). It is nevertheless, as stated above, a tax upon the act of transportation and not upon the goods as a part of the general mass of property within the United States, irrespective of their movement. In the case of U. S. *v.* Hvoslef, *supra*, the court said:

> 'The prohibition relates only to exportation to foreign countries (Woodruff *v.* Parham, 8 Wall. 123; Dooley *v.* United States, 183 U. S. 151, 154, 162), and is designed to give immunity from taxation to property that is in the actual course of such exportation (Pace *v.* Burgess, 92 U. S. 372; Turpin *v.* Burgess, 117 U. S. 504; Cornell *v.* Coyne, 192 U. S. 418). This constitutional freedom, however, plainly involves more than mere exemption from taxes or duties

which are laid specifically upon the goods themselves. If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction, but in effect overriding it. It was the clear intent of the framers of the Constitution that "the process of exporting the products of a State, the goods, chattels and property of the people of the several States, should not be obstructed or hindered by any burden of taxation". Miller on the Constitution, p. 592.

The distinction between articles in the course of transportation to foreign countries and articles merely being manufactured, or warehoused, for exportation is justified by the decisions quoted by the Supreme Court of Pace *v.* Burgess, Turpin *v.* Burgess, and Cornell *v.* Coyne, as well as by the cases cited, *infra*, on the necessity of a through bill of lading. It is evident that a tax upon the freight on articles destined for export might cause a serious discrimination between inland States and those situated near the seaboard, and thus produce the very evil the Constitution intended to prevent.

However, it is not necessary for present purposes to go further than to say that the power to levy a tax on the freight on articles moving in the course of transportation to foreign countries is so doubtful as to lead to the conclusion that Congress did not intend by section 500 to exercise it, but merely meant to cover property 'consigned from one point in the United States to another', not in the course of exportation. (See U. S. *v.* Jin Fuey Moy, 241 U. S. 394, 401.)

2. It is now entirely settled that the question whether goods are in the course of transportation in interstate or foreign commerce does not depend upon the bill of lading or formal matters of that sort, but upon the real substance and intent of the shipment. (Texas & N. O. R. R. Co. *v.* Sabine Tram Co., 227 U. S. 111, and cases cited; Louisiana R. R. Comm. *v.* Tex. & Pac. Ry., 229 U. S. 336; So. Covington Ry. *v.* Covington, 235 U. S. 537, 545; Ill. Cent. R. R. *v.* Louisiana, 236 U. S. 157, 163; Atchison & Topeka Ry. *v.* Harold, 241 U. S. 371, 376.) The case is different where the shipment is, in fact, 'broken'. (Gulf, Colorado & S. F. Ry. Co. *v.* Texas, 204 U. S. 403.)

My conclusion is that section 500 should be construed as not covering freight on articles in course of exportation, and that articles may be in course of exportation without a through bill of lading. I venture to suggest, however, that your regulations require strict proof of the fact that the shipment in question is really destined for export.

Respectfully yours,

T. W. GREGORY

To the Secretary of the Treasury."

(31 Op. Atty. Gen. 299.)

"DEPARTMENT OF JUSTICE,
JUNE 5, 1918.

SIR: I have the honor to acknowledge your letter of April 11th requesting my opinion as to whether the tax imposed by section 600 of the war

revenue act of October 3, 1917 (40 Stat. 300, 316), and by other sections of that act upon articles sold by a manufacturer, producer, or importer, applies to sales in foreign commerce by a manufacturer, producer, or importer located in one of the several States of the United States.

You state that, while the subject matter of your inquiry is general, the following portion of section 600 is typical of the entire class of taxes to which you refer:

> 'That there shall be levied, assessed, collected, and paid—
>
> (*a*) Upon all automobiles, automobile trucks, automobile wagons, and motorcycles sold by the manufacturer, producer, or importer a tax equivalent to three per centum of the price for which so sold.'

You further state, as to the method of business in the articles covered by section 600, that—

> 'Automobiles or other articles may normally be sold in foreign commerce in several ways. (1) Articles may be shipped by the manufacturer to an agent in a foreign country and after reaching there may be sold by the agent. (2) Articles may be shipped by the manufacturer to a foreign purchaser to fill orders accepted by an agent in a foreign country. (3) Articles may be shipped by the manufacturer to a foreign purchaser to fill orders received by the manufacturer in the United States. (4) Articles may be shipped by the manufacturer to a foreign purchaser to fill orders solicited by mail and received by mail from a foreign purchaser.'

You then state the precise question submitted to me, as follows:

> 'Whether the tax imposed by section 600 of the act of October 3, 1917, applies to the articles specified therein when sold in foreign commerce by any of the methods above outlined by a manufacturer, producer, or importer located in a State of the United States.'

In my judgment it does not.

In my opinion to you of March 12 last I held that section 500 of the act of October 3, 1917, levying a tax upon the transportation of property from one point in the United States to another should not be held applicable to property in the course of transportation to foreign countries, because such a construction would cause grave doubt as to the validity of that portion of the act, in view of the constitutional prohibition against a tax upon articles exported from any State.

Since that opinion was rendered the Supreme Court, in the case of Peck *v.* Lowe, decided May 20 last, has announced at length the principles governing this subject, so as to leave nothing except their intelligent application.

In the case referred to the court, having before it the unlimited power of Congress to lay taxes on the one hand and the constitutional prohibition that no tax shall be laid on articles exported from any State on the other, stated that the amendment prohibiting a tax on articles exported—

> 'Excepts from the range of that power articles in course of exportation, * * * the act or occupation of exporting * * *, bills of lading for articles being exported * * *, charter

parties for the carriage of cargoes from State to foreign ports * * *, and policies of marine insurance on articles being exported * * *. In short, the court has interpreted the clause as meaning that exportation must be free from taxation, and therefore, as requiring "not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation".'

The court then announced as a general principle governing the validity of a tax claimed to be on articles exported that—

'The true test of its validity is whether it "so directly and closely" bears on the "process of exporting" as to be in substance a tax on the exportation.'

Finally in deciding that a tax on the net income of an exporter was not a tax on the articles exported by him, the court, explaining the extent to which it was prepared to go, stated that such a tax upon the net income of the individual engaged in the business of exporting was not a tax—

'on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes.'

The inference necessarily and justly is that a tax upon anything which inherently or by the usages of commerce is embraced in exportation or any of its processes is a tax upon 'articles exported' within the meaning of the Constitution.

The tax levied by section 600 of the act of October 3, 1917, and by the analogous sections, is clearly one on sales, and it is measured by the price for which the article is sold. If, therefore, this

tax be held to apply to sales in foreign commerce, its incidence will be directly upon a process inherently embraced in exportation to as full an extent as a tax on freights, on the charter party, or on the policy of insurance.

The subject matter of your question is therefore governed by my opinion to you of March 12 last, confirmed by the principles stated by the Supreme Court in Peck *v.* Lowe.

Respectfully,

T. W. GREGORY.

To the Secretary of the Treasury."

(32 Op. Atty. Gen. 572.)

"DEPARTMENT OF JUSTICE
JUNE 13, 1921

SIR:

You have requested my opinion on the taxability, under section 500 of the War Revenue Act of October 3, 1917, of the amounts paid by a shipper (vendor) for the transportation of goods within the United States in connection with the following transactions:

'1. Where a sale of goods is effected within the United States to a foreign buyer, the agreement of sale requiring delivery to be made by the vendor free on board port of exportation (*a*) to an agent of the foreign buyer, or (*b*) direct to the ocean carrier for transportation to the foreign buyer, title passing and the sale being completed in either instance upon such delivery in this country, it being understood by both the purchaser and the shipper (vendor) at

the time of the bargain that the goods are to be exported.

'2. Where the sale is made free on board port of exportation to a so-called "forwarding agent", who makes a business of receiving goods in this country and forwarding them to his clients abroad, his authority being limited to the activities necessarily incident to the shipment of the goods, including the arrangement for the insurance, payment for the goods, etc., the producer or manufacturer knowing that the goods are to be immediately exported and his contract being with the foreign purchaser.

'3. Where the sale is made free on board port of exportation to a firm of brokers or to an export house, who then export the goods pursuant to contracts or orders from their own clients, the producer or manufacturer, however, knowing that the goods are to be immediately exported pursuant to said contracts or orders, concerning which he has previously been informed.

'4. Where in each of the preceding transactions, the goods are delivered free on board port of exportation, but by the terms of the contract of sale title to the goods passed upon receipt thereof by the carrier at point of origin; the intention of the parties being not to impose any obligation upon the seller to deliver the goods at port of exportation, but merely as a matter of adjustment of the price to throw the expense of the freight upon the seller.'

Section 500 (40 Stat. 314) of the aforesaid Act provides:

> 'That from and after the first day of November, nineteen hundred and seventeen, there shall be levied, assessed, collected, and paid (*a*) a tax equivalent to three per centum of the amount paid for the transportation by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water of property by freight consigned from one point in the United States to another. * * *'

On March 12, 1918, this section was construed by my predecessor (31 Op. 239) as not applicable to freight on articles in course of exportation, since otherwise it would violate the prohibition of the Constitution against taxation on exportation. In that opinion the test laid down was whether the transportation was *in fact* a part of the process of exportation, in which event section 500 was held inapplicable.

In the transaction above stated the transportation, though within the United States, was apparently a part of the process of exportation, and I take it to be immaterial to this question, that in some of the instances, the sales were actually consummated within the United States if, in fact, the goods were actually started in course of exportation when they left the vendor.

Respectfully,

HARRY M. DAUGHERTY

To the Secretary of the Treasury."

(32 Op. Atty. Gen. 567.)

"DEPARTMENT OF JUSTICE
JUNE 13, 1921

SIR:

On June 6, 1921, you requested my opinion on the taxability under section 600 of the Act of October 3, 1917, as construed by the opinion of my predecessor, of June 5, 1918, and December 11, 1919, of sales made under the following circumstances:

'During the recent war the Republic of France contracted with certain automobile manufacturers in this country for the purchase of automobile trucks to be exported and used on foreign soil in the prosecution of said war. Owing to the unprecendented congestion and perils of ocean transportation, as well as the absolute necessity for war-time secrecy, the contracts provided that deliveries be made in accordance with the following extracts therefrom:

"'*Mode of delivery*. The articles hereby contracted for shall be delivered by the seller to the buyer free on board railroad terminal, New York district, with lighterage free within the free lighterage limits.

"'In the event the buyer desires to direct the delivery of any of the articles hereby contracted for from New York to other United States Atlantic seaboard port, and gives prior written notice to the seller to this effect, the articles covered by said notice shall be delivered by the seller at such other United States Atlantic seaboard port. * * *'

"As the Government of France then con-

trolled the available cargo space on vessels sailing for France, the trucks were actually exported and routed in secret by the French authorities.'"

Section 600 of the Act (40 Stat. 316) provides:

'Sec. 600. That there shall be levied, assessed, collected, and paid—

(*a*) Upon all automobiles, automobile trucks, automobile wagons, and motorcycles, sold by the manufacturer, producer, or importer, a tax equivalent to three per centum of the price for which so sold;'

In the opinion of June 5, 1918 (31 Op. 299), you were advised that the tax did not apply to articles where delivery was made abroad (1) shipped by the manufacturer to an agent in a foreign country and after reaching there may be sold by the agent (2) shipped by the manufacturer to a foreign purchaser to fill orders accepted by an agent in a foreign country (3) shipped by the manufacturer to a foreign purchaser to fill orders received by the manufacturer in the United States or (4) shipped by the manufacturer to a foreign purchaser to fill orders solicited by mail and received by mail from a foreign purchaser. The reason advanced for these conclusions was that a tax on sales under those conditions bore so directly and closely upon the process of exporting as to be in substance a tax on exportation and therefore violative of the constitutional prohibition against a tax upon articles exported from any State.

In the opinion of December 11, 1919 (32 Op. 84), it was held that when the manufacturer sells

and delivers articles to a foreign buyer whose agent receives them in the United States, or where the sale and delivery are made to a 'forwarding agent' who receives them in the United States and forwards them to his customers abroad the sale is completed in the United States; the buyer and not the seller exports. No tax is levied on the buyer, and the tax on the seller is not so directly and closely related to the process of exporting as to be a tax on that exportation, even though the seller knew at the time of the transaction that the goods were to be shipped abroad, and in the second instance the seller's contract was with the foreign purchaser.

The instant case appears to be analogous to those presented in the latter opinion; the contract of the seller was with the foreign buyer, but delivery was made and the sale completed in the United States, the exportation being a matter solely for the buyer. The tax in such cases is not a tax upon articles in course of exportation, nor does it bear so directly and closely upon the process of exporting as to be in substance a tax on exportation. As was said in Cornell *v.* Coyne, 192 U. S. 418, 427:

> 'The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation.'

My conclusion is, therefore, that sales made under the circumstances outlined above, are taxable under Section 600 of the Act of 1917.

Respectfully,

HENRY M. DAUGHERTY

Secretary of the Treasury."

It is to be noted that it is upon the basis of decisions by this Court that the Attorney General held that the transportation tax provided for in Section 500 of the Revenue Act of 1917 could not be applied to articles in course of exportation, and that articles were in course of exportation when they were delivered by a manufacturer at an interior point into the custody of a carrier for transportation to the port of exportation from which they were to be carried to the foreign destination. Some of the decisions of this Court referred to by the Attorney General, and which so clearly defined what constitutes "course of exportation" have been quoted, *supra*. But when the Attorney General dealt with Section 600 of the same law, wherein the tax is laid explicitly upon the articles themselves, he ignored altogether the decisions of this Court defining when articles are in "course of exportation"; and when he held that articles were subject to tax when sold by a manufacturer to an exporter for export and delivered by the manufacturer into the custody of a carrier for transportation to the exporter at the port of exportation, his opinion in this matter was necessarily in conflict with the decisions of this

Court referred to by him in connection with the transportation tax, and hence irreconcilable with his ruling in the matter of the transportation tax.

The last opinion cited (32 Op. Atty. Gen. 567) dealt with automobile trucks purchased by the Republic of France, respecting which the contract of purchase, as stated by the Attorney General, provided that:

> "The articles hereby contracted for shall be delivered by the seller to the buyer free on board railroad terminal, New York District, with lighterage free within lighterage limits.
>
> "In the event the buyer desires to direct the delivery of any of the articles hereby contracted for from New York to other Atlantic seaboard port and gives prior written notice to the seller to this effect, the articles covered by said notice shall be delivered to the seller at such other United States seaboard port."

The Attorney General held these automobile trucks to be taxable under Section 600 because:

> "The buyer and not the seller exports. No tax is levied on the buyer and the tax on the seller is not so directly and closely related to the process of exporting as to be a tax on that exportation; even though the seller knew at the time of the transaction that the goods were to be shipped abroad, and in the second instance the seller's contract was with the foreign purchaser. The tax in such cases is not a tax on articles in course of exportation."

It is evident that the Attorney General has overlooked the fact that goods enter foreign commerce when sold to supply the demand of a foreign country, and that, as stated by this Court in United States *v.* E. C. Knight Co. (156 U. S. 1) on page 14:

> "The buying and selling and the transportation incident thereto constitute commerce."

As a sale includes delivery it necessarily involves movement or transportation of the goods from seller to buyer, and when this movement or transportation commences the goods, when sold to an exporter in the United States to supply the demand of a foreign country, as in the case of the plaintiff-in-error, are in course of exportation under decisions of this Court. It is manifest, therefore, that the Attorney General in attempting to distinguish between sale and transportation has not taken into consideration the fact that a sale, as distinguished from an agreement to sell, includes transportation and that such transportation is incident thereto.

In the opinion cited construing the transportation tax (32 Op. Atty. Gen. 572), as applied under identical conditions as to sale and delivery within the United States by the manufacturer, the Attorney General said:

> "This Section (Section 500 of the Revenue Act of 1917) was construed by my predecessor (31 Op. 239) as not applicable to freight on articles in course of exportation. . . . I take it to be immaterial to this question that in some in-

stances the sales were actually consummated within the United States if, in fact, the goods were actually started in course of exportation when they left the vendor."

From this confusion in the opinions of the Attorney General this remarkable situation has arisen—that the automobiles sold by manufacturers, located at interior points such as Detroit, to export commission houses at ports of exportation, for export by such houses, and which automobiles were delivered to railroad carriers at Detroit or other interior points, for transportation to the exporters at the ports of exportation, were held in course of exportation upon such delivery to the carrier at the interior point, and, therefore, exempt from tax, as to the transportation tax, because ordered and shipped for foreign destinations; but these identical articles, upon the identical transactions so sold, delivered and shipped to the exporters at the port, were held to be not in course of exportation (and hence taxable) under Section 600 of the same Act. *That is to say, the identical articles in the identical commerce throughout were exempt from the transportation tax before delivery to the exporter, because in course of exportation at the time when received by the carrier from the manufacturer for transportation to the exporter, but were not in course of exportation as to Section 600, and hence taxable, notwithstanding that such tax could not be "laid on the articles themselves" until after they had been delivered by such carrier to the exporter.* This confusion would have been en-

tirely avoided by obedience to the decisions of this Court that articles in course of exportation are exempt from tax. At the end of the opinion dealing with Section 600 (32 Op. Atty. Gen. 567), the Attorney General attempts to sustain his contention by citing as follows from Cornell *v.* Coyne, 192 U. S. 418, 427:

> "The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation."

The reference to this decision is a further illustration of the confusion which prevails in the opinions cited *supra*, as Cornell *v.* Coyne (*supra*) relates solely to a tax imposed on the production or manufacture of articles. The tax was therefore assessed in that case on the articles as manufactured and before they entered commerce; that is, the tax accrued as soon as the manufacture was complete and did not affect commerce at all. The articles might never be sold, and yet the tax accrued and was payable with the completion of the manufacturing process. In the case of the plaintiff-in-error the tax was not laid on the articles until after they had been sold. As a sale is not complete until delivery of the article is made, the tax was not payable in the case of the plaintiff-in-error until after delivery into the physical custody of the exporting ves-

sels, and hence the articles were taxed after they had been placed in course of exportation.

Of course, articles sold in intrastate or interstate commerce for consumption in the United States were taxable under Section 600 even if subsequently exported, but articles sold for export by the manufacturer and placed in course of exportation by the manufacturer, as in the case of the plaintiff-in-error, were clearly not taxable under the decisions of this Court.

SECOND.

The sales by the plaintiff-in-error were sales in foreign commerce, and were not taxable.

This Court has not only decided that articles in course of exportation cannot be taxed, but also has indicated that contracts of purchase and sale between exporters and manufacturers, of articles to be exported to supply demands from foreign countries, which in this case were the orders received from the exporters and accepted by the plaintiff-in-error, cannot be taxed.

In United States *v.* E. C. Knight Company (*supra*), this Court said (on p. 14):

> "contracts to buy, sell or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purpose of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce."

Such contracts to buy and sell are therefore as much a part of commerce as is transportation, and they determine the character of the transportation incident thereto. Thus, in Railroad Commission *v.* Texas & P. R. Co. (*supra*), and in Texas & N. O. R. Co. *v.* Sabine Tram Co. (*supra*) this Court made it clear that, since articles sold by a manufacturer to an exporter located in the same state, to supply the demands of foreign countries, constituted a sale in foreign commerce, the transportation essential to delivery of the articles to the exporters at the port of export was necessarily in foreign commerce.

In United States *v.* Hvoslef (*supra*), this Court dealt with the taxation by Congress of charter parties, or agreements for the transportation of goods to foreign countries, the goods not being in course of exportation at the time such agreements were executed. As to such agreements this Court said:

> "There is a further objection that the goods were not on the vessel at the time the charter party was made, but as the charters related only to the exportation this objection is plainly without merit."

Since a mere agreement to transport goods to a foreign country is exempt from tax because it relates to the intended exportation of articles, it is certain that a contract subsequently negotiated by exporter and manufacturer for the purchase and sale of such articles, which are thus purchased to supply the demand of a foreign country, must likewise be exempt from tax, and

hence the goods must also be exempt from tax from the time such contract is made.

The decision of this Court in Coe *v.* Errol (*supra*), holding that articles cannot be taxed in course of exportation, makes it clear that *an actual intention to export goods* protects such articles from tax. In that case the Court said:

> "Of course they (the articles) cannot be taxed *as* exports; that is to say, they cannot be taxed by reason or because of their exportation or intended exportation; for that would amount to laying a duty on exports and would be a plain infraction of the Constitution * * * If assessed in an exceptional time or manner, because of their anticipated departure, they might well be considered as taxed by reason of their exportation or intended exportation; but if assessed in the usual way when not under motion or shipment, we do not see why the assessment may not be valid and binding."

The decision of this Court in Turpin *v.* Burgess (*supra*) was to the same effect. The Court said:

> "The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their intended exportation or while they are being exported. That would be laying a tax or duty on exports or on articles exported within the meaning of the Constitution."

In the opinion of the Attorney General dated June 5, 1918 (*supra*), he said:

> "The tax levied by Section 600 of the Act of October 3, 1917, and by the analogous Sections is

clearly one on sales and it is measured by the price for which the article is sold. If, therefore, this tax be held to apply to sales in foreign commerce, its incidence will be directly upon a process inherently embraced in exportation to as full as extent as a tax on freights, on the charter party, or on the policy of insurance."

When the opinions of the Attorney General (*supra*) are considered together, holding on the one hand that articles sold to an exporter in this country by a manufacturer to supply the demands of foreign countries and, therefore, sales in foreign commerce, are taxable because the ocean bills-of-lading were not taken out by the manufacturer, and holding on the other hand that the amounts paid under Section 500 of the Revenue Act of 1917 for the transportation within the United States of the same articles for delivery to the same exporter at port of export were not taxable because the sale was made to supply the demands of foreign countries, and was, therefore, a sale in foreign commerce, the error of the Government's contention in the case of the plaintiff-in-error is clearly manifest.

With respect to orders of purchase originating in foreign countries for articles to be shipped thereto from the United States, it is a practical necessity for the foreign buyers to have representatives in the United States to obtain the goods from the manufacturers here and forward them to the foreign buyers. Such has been the ordinary course of business in the export trade for many years, and a large part of the American

export trade has been built up through the work of export commission houses in the United States acting as agents and representatives of foreign buyers, and thereby establishing foreign markets for American commodities. The exigencies of trade have established these exporting agencies in the United States. As was said by the Court in Thames and Mersey M. Ins. Co. (*supra*), "It is the exigencies of trade which determine what is essential to the process of exportation."

It would lead to a manifest absurdity if it could be ruled that goods, sold to such exporting agencies to fill foreign orders actually in hand and delivered into the custody of exporting carriers, are not thereby in course of exportation and exempt from tax, since in that event foreign buyers after placing their orders would have to stand aside entirely and leave it to the manufacturer to forward the goods to the foreign consignees by his own efforts solely. This would be a decided disadvantage to manufacturers in interior parts of the country, remote from the seaboard. It is to be noted that the Attorney General went so far as to say that even when the foreign buyer came to this country in person and himself ordered the goods from the manufacturer, the foreign buyer could not himself export the goods without the tax thereon being payable. Such is the result of ignoring the decisions of this Court to the effect that it is immaterial whether the manufacturer or shipper in the interior, or the exporter at the port, takes out the export bill-of-lading.

In Conclusion.

Briefly the plaintiff-in-error contends that the articles were sold for export and were taxed in course of exportation contrary to the decisions of this Court, because it was not possible under the law to apply the tax until after the articles were in course of exportation; and that the articles having been sold to supply the demands of foreign countries, were, by reason of that fact, protected from burden of tax, under decisions of this Court.

The judgment of the District Court should be reversed with costs, and the District Court directed to overrule the demurrer interposed by the defendant.

Respectfully submitted,

FRANKLIN GRADY,
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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

A. G. SPALDING & BROS., PLAINTIFF IN error,
v.
WILLIAM H. EDWARDS, COLLECTOR OF Internal Revenue for the Second District of New York.
No. 710.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF CASE.

This is a writ of error to review a judgment sustaining a demurrer to an action in assumpsit for the recovery of $11.11, alleged to have been wrongfully exacted from the plaintiff in error corporation (hereinafter called the plaintiff) as an excise tax upon the sale by it of certain sporting goods of its manufacture. The taxes were levied under the provisions of Section 600 (f), Title VI, of the War Revenue Act of 1917 (40 Stat. 316, 317), and the plaintiff seeks recovery on the ground that they were levied and collected upon "articles exported" from a State, in violation of Article I, Section 9, of the Constitution of the United States.

The opinion rendered by the District Court in sustaining the demurrer will be found in the Record at pages 22–24.

ALLEGATIONS OF THE COMPLAINT.

The complaint is in three counts seeking recovery of taxes paid on account of sales made to three different individuals and for different months. Except for the amounts, names of the persons to whom the sales were made, the dates of the sales, and the months for which the taxes were collected, the counts are identical. Therefore, only the first count will be considered in this brief.

The material allegations of the first count (R. 2–5) are as follows:

On or about the 28th day of February, 1919, the defendant, as Collector of Internal Revenue, and claiming to act under Section 600 of the War Revenue Act of 1917, demanded of plaintiff the sum of $5.70, which defendant claimed to be then due from plaintiff as a tax *on the sale* of certain goods manufactured and sold by the plaintiff in the United States in the month of January, 1919. Plaintiff paid said sum to defendant under protest and this suit is brought to recover said sum.

The sale was made under the following circumstances: Under date of November 20, 1918, Delgado & Cia, a mercantile firm of La Guaira, Venezuela, ordered Scholtz and Company, a firm of shipping and export commission merchants with offices in New York City, to purchase for their account and risk certain baseballs and baseball bats and to cause the same to be shipped to them at La Guaira. A copy of this order is annexed to the petition and marked "Exhibit A." (R. 10.)

Pursuant to said order, Scholtz and Company, on December 10, 1919, sent a written order to plaintiff

for said merchandise. The order is in words and figures as follows (R. 11):

EXPORT ORDER FROM SCHOLTZ & CO.,
Shipping and Commission Merchants.
Telephone 7133 Hanover.

82 WALL STREET,
New York, Dec. 10th, 1918.

To A. G. SPALDING & BROTHER:

Please ship on or before the ---------- per steamer. (Rush.)

IMPORTANT.—Separate Invoice required for each Mark.

In all cases prepay freight to New York. If your prices do not cover delivery to Steamer, charge the freight on invoices.

Gross weight of each package and separate net weight of each article must appear in your invoice.

Errors in weight often entail heavy fines in Foreign Custom Houses, therefore be careful when weighing and marking Goods, as we shall hold you responsible for any fines caused through your errors.

Cases or crates must be made to fit Goods as duty is paid by Gross weight.

Shipping Mark and Number
to be put on Packages

D x C 35 doz. Professional #7 B. Base Balls.
S 10 " Junior League #8 "
La Guaira 12 " #50 T. Base Ball Bats
#36 as invoiced Oct 15/18
(signed) SCHOLTZ & CO. 12/2/18
3054

Please send Memo. Invoice at once so we can apply for license and clear at Custom House.

Pursuant to said order from Scholtz and Company, plaintiff, on January 22, 1919, sold to Scholtz and Company 45 dozen baseballs and 10 dozen baseball bats at the agreed price of $190, the said Scholtz and Company agreeing to pay therefor within ten days of delivery. Said goods were purchased by Scholtz and Company for the sole purpose and intention of exporting the same from the United States to Delgado & Cia, in Venezuela, which fact was at all times known to plaintiff, and said order from Scholtz and Company was accepted by the plaintiff with the intention that the goods should forthwith be exported. Scholtz and Company, in obedience to instructions from Delgado & Cia, instructed plaintiff to mark the packages containing said goods with names and distinguishing marks, thus R 4:

D & C
S
"La Guaira,"
#36

to indicate the purchaser and its locality in Venezuela, and then to deliver the packages into the custody of the Atlantic & Caribbean Steam Navigation Co., an exporting carrier, at the City of New York.

Pursuant to such instructions, the plaintiff marked the packages and delivered the same into the custody of the exporting carrier at the City of New York and obtained a receipt therefor from the agent of the carrier, which receipt was transmitted by plaintiff to Scholtz and Company and thereafter surrendered by the latter in exchange for an export bill of lading, a copy of which is attached to the complaint. (Exhibit C. R. 11, 12.) The baseballs and baseball bats were manufactured and produced by plaintiff within

the United States at a time subsequent to October 4, 1917. Under date of January 22, 1919, plaintiff forwarded to Scholtz and Company an invoice of the goods, and the latter made payment therefor on February 1, 1919. A copy of the invoice is attached to the complaint and made a part thereof, and is in words and figures as follows (Exhibit D, R. 12, 13.):

COPY INVOICE FROM A. G. SPALDING & BROS.

JAN. 22, 1919.

Mark: D & C
S
La GUAIRA #36

Sold to SCHOLTZ & Co.,
82 Wall Street, New York City.

No. 3054 EL 1673.

lbs.					
		Case No. 36. Gro. wgt. 222 lbs. Net. wgt. 171 lbs. Meas. 36x29x18.			
164	35 dz.	7B Baseball	4.—	$140.—	
7	6 dz.	8 Baseball	2.—	12.—	
	7 dz.	EX Mitts	1.40	9.80	
		Case No. 37. Gro. wgt. 10 lbs. Net wgt. 69 lbs. Meas. 46x20x18.			
24	34	EX Mitts	1.40	47.60	
20	4 dz. 8	Balls	2.—	8.—	
13	18 dz.	Mask	1.—	15.—	
		Case No. 38. Gro. wgt. 345 lbs. Net wgt. 280 lbs. Meas. 42x26x22.			
10 dz.		50T Bats	4.—	40.—	
				272.40	
		5%-- ----------		13.62	258.78

Said goods were duly transported by said carrier to La Guaira and were delivered to Delgado & Cia, about February 18, 1919.

Scholtz and Company made said purchase in obedience to instructions from Delgado & Cia, and upon an understanding with the latter that the former were to receive as compensation for said service a commission upon the price at which the goods were bought, it being further understood that the goods were to be bought by Scholtz and Company for the account and risk of Delgado & Cia. Scholtz and Company made payment to plaintiff under an agreement with Delgado & Cia that the purchase should be made upon open account with the latter and payment therefor made to Scholtz and Company within 90 days from the date of shipment. The goods were actually paid for within 90 days, as agreed. The export bill of lading, marine insurance, and other shipping documents were taken out in the name of Scholtz and Company, pursuant to instructions from Delgado & Cia.

STATUTE AND REGULATIONS.

Section 600 of Title VI of the War Revenue Act of 1917 (40 Stat. 316, 317), so far as is here pertinent, provides as follows:

> That there shall be levied, assessed, collected, and paid—
>
> (*f*) Upon all tennis rackets, golf clubs, baseball bats, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing

rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games, except playing cards and children's toys and games, *sold by the manufacturer*, producer, or importer, a tax equivalent to 3 per centum of the price for which so sold; * * *.

The pertinent Treasury Regulations are as follows:

Regulations 44, Article III:

> *Basis of tax.*—The tax is on the sale of the articles enumerated, or in the case of positive moving-picture films on their sale or lease by the manufacturer. The tax is measured by the price for which the article is sold, except in the case of moving-picture films. * * *

Article IV:

> When tax attaches: "Sold."—The tax attaches when the article is sold; that is to say, when the title to it passes from the seller to the buyer pursuant to a previous contract of sale or upon a sale without previous contract.

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ARGUMENT.

I.

THE HISTORY OF THE EXPORT CLAUSE.

Before discussing the statute and pertinent decisions, it may be of some value to recall the history of the constitutional prohibition against a tax on exports.

In Mr. Charles Pinckney's draft, submitted to the Constitutional Convention, on May 29th, 1787, the exports provision was included in his first draft of a constitution, substantially in the words finally adopted.

The subject did not apparently come up again, until July 12th when, in discussing the plan to base representation in Congress upon wealth, and taxation in proportion to representation, the question of the value of the slaves arose. It was then suggested that taxation based upon wealth should be restricted to direct taxation. Mr. Gouverneur Morris said: "With regard to indirect taxes upon exports and imports and on consumption, the rule would be inapplicable."

The question was next discussed on July 23d, when the tentative drafts were to be referred to a committee to report a constitution based thereon. General Pinckney then reminded the Convention that, if the Committee should fail to insert some security to the Southern States against the emancipation of the slaves, and a tax on exports, he should be

bound, by duty to his State, to vote against their report.

On August 6th, the report of the Committee on Detail was made and it contained a prohibition against any tax on articles exported from any State.

On August 8th, Mr. King expressed his dissatisfaction with the Constitution, as then drafted, on the ground that "exports could not be taxed." He thought that, if slaves were to be imported, that the exports produced by their labor would afford a very good source of Federal revenue. The discussion then proceeded, with a vigorous debate on slavery, which involved the question of a tax on exports, because many staples most likely to be exported would be the product of negro labor.

On August 16th, Mr. Mason suggested that the power of levying taxes and duties should be connected with the prohibition that no taxes should be laid on exports. He said he was unwilling to trust to its being done in a future article. He hoped the Northern States did not mean to deny the Southern States this security; that it would hereafter be as desirable to the former when the latter should become the most populous. He professed his jealousy for the productions of the Southern, or, as he called them, the "staple States." He thereupon suggested that the taxing power be limited by a proviso giving an exemption to exports.

Mr. Sherman did not object to the proviso, except as a matter of style.

Mr. Gouverneur Morris considered the proviso as inadmissible anywhere, and contended that, in some cases, it would not "be equitable" to tax imports without taxing exports, and that taxes on exports would be often the more easy and proper of the two.

Mr. Madison thought that the power of laying taxes on exports was proper in itself, and as the States could not with propriety exercise it separately, it ought to be vested in them collectively; secondly, that it might, with particular advantage, be exercised with respect to articles in which America was not rivalled in foreign markets, as tobacco, &c. He then instanced the fact that there had formerly been an agreement with France that, if taxes were laid in America on the export of tobacco, they should be paid by the farmers and not by the foreign consumer, and that this would raise the price of tobacco for domestic purposes in America; thirdly, he thought it unjust to States whose produce was exported by their neighbors to let the latter States tax them. Finally, he thought that time would equalize the economic situation in all the States, and that therefore a tax on exports was unnecessary.

To this, Mr. Williamson dissented.

Mr. Ellsworth supported Mr. Madison's view, but thought that a rearrangement as to the place of the prohibition was unnecessary.

Mr. Wilson was against any tax on exports. He dwelt on the injustice and impolicy of leaving New Jersey, Connecticut, &c., "to the exactions of their commercial neighbors."

Mr. Gerry thought that the Congress could not be trusted with such a power, as "it might ruin the country. It might be exercised partially, raising one and depressing another part of it."

Mr. Gouverneur Morris thought that Congress must have a power which involved a possibility of destructive use. He thought it highly important that the Congress should have power to tax exports; they were a necessary source of revenue.

Mr. Mercer was opposed to the tax. He thought it was enough that the States sacrificed their right to tax imports.

Mr. Sherman deprecated the reopening of the question, and said that if the power to tax exports were now given to the Government it would "shipwreck the whole" plan.

Further consideration of the matter was then postponed.

The subject was next taken up on August 21st.

Mr. Langdon thought that the Federal Government should have the power to tax exports, provided that two-thirds of Congress agreed.

Mr. Ellsworth denied this, and suggested that Congress should not have the power, firstly, because it would discourage industry; secondly, the produce of different States is such that there could be no uniformity in such taxes; and, thirdly, that such taxes would engender incurable jealousies.

Mr. Williamson said that if the prohibition were stricken out "it would destroy the last hope of the adoption of the plan."

Mr. Gouverneur Morris thought that these local considerations ought not to impede the general interest. He felt that the exporting States would tax the produce of their uncommercial neighbors. If the power were not granted "an embargo could not be made, although, in time of war, such a measure may be of critical importance."

Mr. Butler opposed the power as unjust and alarming to "the staple States."

Mr. Langdon suggested a prohibition upon the States from taxing the exports of other States sent through the former States.

Mr. Dickinson thought that the prohibition should be confined to particular articles.

Mr. Sherman thought that the prohibition must be sweeping, as the States would never give up all power over their trade.

Mr. Madison thought that the Federal Government would need this power, if only to enforce an embargo and to regulate trade.

Mr. McHenry thought that the power to lay an embargo was included in the war power.

Mr. Wilson thought that the prohibition "would take from the common Government half the regulation of trade," and that the Federal power over exports would be more effectual than that over imports in obtaining beneficial treaties of commerce.

Mr. Gerry opposed the Federal power over exports, "as it might be made use of to compel the States to comply with the will of the general government."

Mr. Fitzsimons opposed any immediate power, but was for giving it at a future time, "when America should become a manufacturing country."

Mr. Mason spoke of the different economic interests of the States and the unwisdom of the power.

Mr. Clymer suggested that the power to tax exports should be restricted "for the purposes of revenue." This was voted down, 8 to 3.

Mr. Madison then moved that the Federal Government should have power, with the consent of two-thirds of the legislature, to tax exports. This was voted down, 6 to 5.

The present export provision was then passed by a vote of 7 to 4—New Hampshire, New Jersey, Pennsylvania, and Delaware dissenting.

On August 28th, the question arose as to whether the States should be forbidden to tax exports, and this was passed by a vote of 6 to 5.

On September 10th, the question of the adoption of the Constitution then drafted being under consideration, Mr. Randolph took occasion to state his objections to the system, and, among these, was the lack of power to lay duties on export. He referred to Article I, Section 10, which forbids any State, without the consent of Congress, laying imposts or duties upon exports or imports.

On September 12th, when the Committee on Style made its report, the provision was thus phrased: "No tax or duty shall be laid on articles exported from any State."

After the report was read, Colonel Mason suggested a reconsideration of the clause with respect to exports—meaning thereby the restriction on the States. He thought that this prohibition would prevent the "incidental duties necessary for the inspection and safekeeping of their produce and be ruinous to the staple States," as he called the five Southern States. He thereupon proposed a proviso that the States could levy duties upon exports for the purpose of defraying charges of inspecting, storing, packing, etc. Anticipating the objection that a State could provide for these expenses in other ways, he stated the inconvenience of requiring the planters to pay a tax before actual delivery for exportation.

Mr. Madison supported this motion, as did Mr. Gouverneur Morris, who said that he "*did not consider the dollar per hogshead laid on tobacco in Virginia, as a duty on exportation, as no drawback would be allowed on tobacco taken out of the warehouse for internal consumption.*"

Mr. Dayton, Mr. Gorham, and Mr. Langdon opposed the amendment, as it would permit the exporting States to oppress the nonexporting States. "How," they said, "could there be redress?"

Mr. Madison said: "The jurisdiction of the Supreme Court must be the source of redress."

Mr. Fitzsimons said: "*Incidental duties on tobacco and flour never have been, and never can be, considered as duties on exports.*

Mr. Dickinson thought that nothing would save the nonexporting States from oppression, except a provision requiring the consent of Congress to inspection duties.

That day's session adjourned, without any further action upon this suggestion.

On September 14th, after the clause, "No tax or duty shall be laid upon articles exported from any State," there was added the provision, "No preference shall be given by any regulations of commerce or revenue to the ports of one State over those of another, nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another."

From this history, it will appear that the framers had in mind a tax levied directly and deliberately upon the act of exportation. They were not considering, as Fitzsimons and Gouverneur Morris pointed out in the foregoing italicized quotations, the application of general taxing laws, which might fall in individual cases upon merchandise, which might thereafter be exported. If every article which is or may be exported, were exempt from local taxation, a great source of revenue, whether of State or Nation, would be lost. The framers had in mind, not general taxes, which might subsequently and accidentally fall upon articles exported, but discriminatory statutes upon the act of exportation.

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II.

CONSTRUCTION OF STATUTE.

The tax levied by Section 600 of the Revenue Act of 1917 is an excise levied upon the business of selling the particular articles named in the statute and is measured by the price for which the article is sold.

When we read Section 600 in connection with 602, we find that Congress had in mind a complete and comprehensive plan to tax not only all articles manufactured, produced, or imported after the effective date of the Act, but also all that were manufactured, produced, or imported before that date, but which had not reached the hands of retail dealers. By the first paragraph of Section 602, of Title VI, it is provided (40 Stat. 317):

> That upon all articles enumerated in subdivisions (a), (b), (e), (f), (g), (h), (i), or (j) of section six hundred, which on the day this Act is passed are held and intended for sale by any person, corporation, partnership, or association, other than (1) a retailer who is not also a wholesaler, or (2) the manufacturer, producer, or importer thereof, there shall be levied, assessed, collected, and paid a tax equivalent to one-half the tax imposed by each such subdivision upon the sale of the articles therein enumerated. This tax shall be paid by the person, corporation, partnership, or association so holding such articles. * * *

It will be noted that this section includes the class of articles involved in this suit, namely, sporting

goods, and levies a tax upon all articles there referred to, which on the day the Act was passed were held and intended for sale by any wholesaler, the amount of such tax to be one-half of the tax imposed by Section 600. The tax levied by this section necessarily applies to goods manufactured, produced, or imported before the Act went into effect. The fact that Congress went so far as to tax such articles in the hands of the wholesaler argues conclusively that it intended also to tax such articles that were still in the hands of the manufacturer, producer, or importer on the effective date of the Act. So to construe it gives Title VI the appearance of a complete scheme or plan; to construe it otherwise is to give the Act an appearance of a haphazard, ill-considered effort. To levy a tax with respect to all articles in existence on the effective date of the Act, which had not reached the hands of the retailer, is consistent; to levy a tax with respect to articles in the hands of the wholesalers on the effective date of the Act, and yet exempt from tax articles in the hands of the manufacturers, producers, or importers on that date, is to take a slice out of the middle and leave the ends untouched. This becomes clearer when we consider that the primary purpose of the Act (as shown by the fact that Section 600 unquestionably taxes all articles both manufactured and sold after the effective date of the Act) was to tax manufacturers—those engaged in the very beginning of the process of manufacture and distribution.

A tax upon sales is not novel. Many of the states have levied such a tax.

The United States Supreme Court has had the sales tax of at least one State before it. The case of *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, involved a law of the State of Pennsylvania levying an annual tax of one-half mill on the dollar on gross business transacted by wholesale dealers in merchandise and a like tax at another rate on retailers. The court there characterized the Pennsylvania state tax as "a state tax imposed upon the business of selling goods."

So far as it affects the nature of the tax, the Act of Congress now under discussion and the Pennsylvania statute are substantially identical. Both lay an excise on the right to sell or the business of selling measured by gross sales. The fact that one Act fixes the tax at a per cent of the selling price of each individual article while the other fixes it at a certain per cent on gross sales is immaterial. The effect in each case is to lay a tax measured by a fixed per cent of total sales.

In the very recent case of *Heisler* v. *Thomas Colliery Co.* (decided by this Court November 27, 1922) the State of Pennsylvania passed an Act taxing each ton of anthracite coal "washed, or screened, *or otherwise prepared for market.*" The tax was assessed when the coal was "ready for shipment or market."

It was conceded that 80 per cent of the anthracite coal mined in Pennsylvania was shipped to other States, and the question became the more important

because Pennsylvania, having virtually all of the anthracite coal reserves of the country, could, if this tax—which thus largely fell upon exports to other States—were legal, tax the consumers of other States.

It was vigorously contended that such a tax was a burden upon interstate commerce. This Court, however, refused to accept the contention that, because the products of one State "are destined to have a market in other States," they are therefore subjects of interstate commerce. Thus the Court said:

> The reach and consequences of the contention repels its acceptance. If the possibility, or, indeed, certainty of exportation of a product or article from a State determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from State jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States at the very inception of their production or growth that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet "on the hoof", wool yet unshorn, and coal yet unmined because they are in varying percentages destined for and surely

to be exported to States other than those of their production.

This Court held that the validity of the Pennsylvania tax was not only sustained by the leading case of *Coe* v. *Errol*, 116 U. S. 517, but also by *Cornell* v. *Coyne*, 192 U. S., 418; *Susquehanna Coal Co.* v. *South Amboy*, 228 U. S. 665; *Bacon* v. *Illinois*, 227 U. S. 504; *General Oil Co.* v. *Crain*, 209 U. S. 211; *United Mine Workers* v. *Coronado Coal Co.*, decided June 5, 1922.

This would seem to dispose of the contention in this case that the mere fact that the plaintiff knew that his vendee had bought the articles for the purpose of exportation, and that plaintiff in making the delivery did so in a condition and with markings adapted to such exportation, indicated that the act of exportation had actually begun. Nor does the fact that, at the instance and for the accommodation of the vendee, the plaintiff delivered the goods in question to a steamship dock, mean that the act of exportation had begun. A similar state of facts was shown in the case of *Coe* v. *Erroll, supra;* but, as the exemption of Article I, Section 9, to the general taxing power should be strictly, although not illiberally, construed, it is clear that exportation does not begin until the shipper (who was not the plaintiff) makes his contract with the steamship company and consigns the goods to the carrier's care for such shipment. Then, and only then, the act of exportation begins, and every part or instrumentality thereof is within the Constitutional exemption.

Neither bill of lading, charter party, policy of marine insurance, nor any other incident to the carriage to a foreign country can be taxed; but the *antecedent* stages of purchasing the article to be exported and its delivery to the vendee, who then exports it, does not bring these antecedent acts within the Constitutional exemption.

Where a manufacturer sells and delivers the articles enumerated in Section 600 within the United States, a tax upon such sales is not a tax upon exportation, even though the goods are subsequently exported by the purchaser, and even though the sale was made by the manufacturer with the knowledge and intention that they should forthwith be exported. *The buyer, not the seller, exports.* A tax, therefore, upon the seller can not be said to be a tax on exports, even though the seller may know that the goods are being bought for the purpose of being exported by his vendee, and although they may, in fact, actually be shipped to a foreign destination, for the sale is completed, and the seller's interest in the transaction ceases before exportation begins. It is the buyer in such a case who exports, *and no tax is levied upon him.*

The complaint alleges a sale and delivery within the United States. In Paragraph 7, it avers that pursuant to the order from Scholtz and Company, the plaintiff sold to the former the articles on which the tax was collected, and in the same paragraph, it states that pursuant to instructions the plaintiff delivered the goods into the custody of the exporting carrier at the

City of New York, and obtained a receipt therefor from the agent of the carrier, which receipt was transmitted by plaintiff to Scholtz and Company.

The complaint also alleges in unmistakable terms that Scholtz and Company, and not the plaintiff, actually exported the goods. In Paragraph 7, it recites that the carrier's receipt was transmitted by plaintiff to Scholtz and Company, who thereafter surrendered it for the carrier's bill of lading, and took out the bill of lading, marine insurance, and other shipping documents in its (Scholtz and Company's) name, and that the goods were subsequently exported by the carrier and upon the bill of lading so issued.

The sole issue presented by the pleadings, therefore, is whether a tax levied upon sales completely consummated within the United States before exportation began is a tax upon exports within the meaning of Article 1, Section 9, of the Constitution, which provides:

> No tax or duty shall be laid on articles exported from any State.

III.

DECISIONS UNDER EXPORT CLAUSE OF THE CONSTITUTION.

The constitutional provision has been often interpreted by the courts. The most recent cases clearly negative the plaintiff's contention. In the case of *Cornell* v. *Coyne*, 192 U. S. 418, in considering an act of Congress levying a tax of one cent per pound upon all filled cheese manufactured in the United

States, to be paid by the manufacturer thereof, this Court said (pp. 426, 427):

> The contention is that inasmuch as this filled cheese was manufactured *under contract for export, and was in fact exported*, the tax of one cent per pound prescribed by section 9 was prohibited by the fifth paragraph of Section 9, Article I, of the Constitution * * *. But this means that no burden shall be placed on exportation, and does not require that any bounty be given therefor * * *. Subjecting filled cheese manufactured for the purpose of export to the same tax as all other filled cheese is casting no tax or duty on articles exported, *but is only a tax or duty on the manufacturing of articles in order to prepare them for export.* * * * *The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation.*

In *Turpin* v. *Burgess*, 117 U. S. 504, 506, the Court said:

> The constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State. In the one case the words are, "No tax or duty shall be laid on articles exported from any State." Art. I, sec. 9, par. 5. In the other they are, "No

> State shall, without the consent of Congress, lay any imposts or duties on imports or exports." Art. I, sec. 10, par. 2. The prohibition in both cases has reference to the imposition of duties on goods *by reason or because of their exportation or intended exportation, or whilst they are being exported.* That would be laying a tax or duty on exports, or on articles exported, within the meaning of the Constitution. *But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition.*

In the case of *Coe* v. *Errol*, 116 U. S. 517, 525, in dealing with a direct tax levied by a State upon certain personal property, this Court said:

> Of course they can not be taxed *as* exports; that is to say, they can not be taxed by reason or because of their exportation or intended exportation; for that would amount to laying a duty on exports, and would be a plain infraction of the Constitution, which prohibits any State, without the consent of Congress, from laying any imposts or duties on imports or exports; * * * But if such goods are not taxed as exports, nor by reason of their exportation, or intended exportation, *but are taxed as part of the general mass of property in the State,* at the regular period of assessment for such property and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed? *Though intended for*

> *exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State?* If assessed in an exceptional time or manner, because of their anticipated departure, they might well be considered as taxed by reason of their exportation or intended exportation; but if assessed in the usual way, when not under motion or shipment, we do not see why the assessment may not be valid and binding.

The rule fairly deducible from the above cases is that, while no burden by way of tax can be cast upon articles as a condition or by reason of their exportation, or intended exportation, or upon the process of exportation, articles which, as a matter of fact, are exported, are not relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the process of exportation, and not to the article before its exportation, or to a privilege exercised before the export process begins.

The Act in question levies a general sales tax upon the sale of the articles enumerated, and the subsequent disposition of the articles by the vendee is not taxed by the Act, which does not regulate or concern itself with exportation. Consequently, it can not be said to be a tax upon exports in a sense that it is levied by reason or on account of the exportation, or intended exportation.

Likewise, in so far as it applies to the particular state of facts set out in the complaint, it can not be said to be a tax upon the privilege of selling goods for export, because the sale having been consummated within the United States, the privilege which is the subject of the tax has been fully exercised before the export process begins. It may be said here, as was said in the case of *Coe* v. *Errol*, *supra*, that though the goods were intended for exportation, and the sale made with knowledge of that fact, they may never be exported. The purchaser receives title and possession of them within the United States and may export them or not, as he sees fit. There may be an actual bona fide intention to export at the time the sale is made and yet the purchaser may change his mind and not export them at all. That the mere intention to export is not sufficient to bring the transaction within the constitutional inhibition is, in view of the Supreme Court's decisions, entirely clear.

Coe v. *Errol*, 116 U. S. 517.
Southern Pacific Co. v. *Arizona*, 249 U. S. 472.

The principles laid down in the above-cited cases have been given practical application by the United States Supreme Court to a great variety of situations.

In the case of *Peck* v. *Lowe*, 247 U. S. 165, it was held that a general tax upon all persons with respect to their income is not a tax upon exportation, even if it taxes the income derived from the sale of goods for export, and even though the person taxed, himself, shipped the goods to foreign countries and

there sold them. Unquestionably, a tax on the income of an exporter does *indirectly* burden exports, but the burden, being indirect, is not within the constitutional exemption, and this because, as this Court said, it is not a tax on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes.

As heretofore shown, in *Cornell* v. *Coyne*, 192 U. S. 418, a tax of one cent a pound on filled cheese manufactured in the United States was said not to be a tax upon exports, even when applied to cheese manufactured *for the specific purpose of exportation and actually exported and delivered abroad by the manufacturer himself.*

In *Pace* v. *Burgess*, 92 U. S. 372, and *Turpin* v. *Burgess*, 117 U. S. 504, a charge for stamps which each package of manufactured tobacco *intended for export* was required to bear before removal from the factory was upheld.

In *American Manufacturing Co.* v. *City of St. Louis*, 250 U. S. 459, an ordinance of the City of St. Louis, Mo., levying against manufacturers a license tax of one dollar on each one thousand dollars of sales made, was held valid as applied to sales of goods manufactured by the plaintiff in the City, but afterwards removed to storage warehouses outside of the state and later sold from these warehouses to purchasers in states other than Missouri. The tax was there objected to, on the ground that it was a burden upon interstate commerce and hence

void under that section of the Constitution giving to Congress exclusive power to regulate interstate commerce. The principle involved, however, is identical.

The cases, which held taxes unconstitutional, as being a part of exportation, all clearly disclosed direct burdens upon some process or instrumentality of exportation. Thus in *Brown* v. *Maryland*, 12 Wheat. 419, a tax upon the occupation of exporting was involved; *Almy* v. *California*, 24 Howard, 169, and *Fairbank* v. *United States*, 181 U. S. 283, taxes upon bills of lading for articles being exported; *United States* v. *Hvoslef*, 237 U. S. 1, a tax upon charter parties for the carriage of cargoes from a state to foreign ports; *Thames and Mersey Insurance Co.* v. *United States*, 237 U. S. 19, a tax upon policies of marine insurance on articles being exported.

The principle underlying the decisions in this group of cases is that no tax burden can be placed upon the process of exportation. Each tax was levied upon some necessary instrumentality of export commerce and hence was a direct burden upon exportation. The distinction between this class of cases and the group just previously discussed, as well as the instant case, is apparent.

It is not necessary to discuss a case where an American vendor sells to a foreign vendee, and the sale is not consummated until the former delivers the goods in a foreign country to his vendee. In the instant case the sale was negotiated and consummated in this country and, as stated, *the vendee* and not the vendor exported. In such case, the language of

this Court in the leading case of *Coe* v. *Errol* is decisive, where this Court said:

> When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State.
>
> * * * * *
>
> But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have

been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject.

* * * * *

The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing.

The application of the principles laid down in *Coe* v. *Errol* to the present case is obvious. The actual export process commenced only with the taking out of the bill of lading by Scholtz and Company, the purchaser. The delivery of the goods by the plaintiff to the steamship dock was not a delivery

for the purpose of exportation on the part of plaintiff, but merely a delivery to a point designated by the purchaser for the purchaser's convenience and on consummation of a sale completed within the United States. In accepting the goods, the steamship company did so in its capacity as warehouseman, rather than carrier. The movement of goods from plaintiff's place of business to the steamship dock was wholly a domestic movement. The export process commenced only after delivery of the steamship company's receipt to Scholtz and Company and the taking out by the latter of the export bill of lading. The tax had antecedently attached upon delivery and acceptance of the goods, in accordance with the contract of sale. Just as a state may tax all property within its borders as long as that property remains a part of the general mass of its property, so Congress may levy a tax upon the exercise of the privilege of selling goods, so long as that privilege is completely exercised within the United States.

The two cases of *Brown* v. *Maryland*, 12 Wheat. 419, and *Waring* v. *Mayor*, 8 Wall. 110, illustrate the distinction between two different classes of cases.

In the former case the State of Maryland had enacted a statute providing that "all *importers* of foreign articles or commodities, * * * shall, *before they are authorized to sell*, take out a license, for which they shall pay $50, and in case of neglect or refusal to take out such license" shall be subject to certain penalties and forfeitures. Brown was

indicted on a charge of having imported and sold one package of foreign dry goods without having a license to do so. He defended on the ground that the act was repugnant to the clause of the Constitution which declares that no state shall, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws. The court held the Act invalid on that ground, that a license tax upon importers for the purpose of selling imported merchandise is necessarily a tax upon importation, since one of the most usual purposes of importation is to sell. The court held that the process of importation ceases only when the importer sells the goods or otherwise mixes them with the general property of the state.

In the case of *Waring* v. *Mayor*, *supra*, Waring, a resident of Mobile, Ala., made a practice of purchasing entire cargoes of salt before the arrival of the vessels bringing it from foreign ports, or before it was entered at the customhouse, the sale to be at the seller's risk until delivery to him at the port of Mobile. The salt so purchased he habitually sold to traders in large quantities and for resale. The City of Mobile imposed a tax for municipal purposes upon all sales of merchandise in that city and claimed of Waring a tax upon his sales of salt. Exemption from tax was claimed by him on the ground that the salt disposed of by him was an import from a foreign country, and as such exempt. The city of Mobile contended that Waring was not the importer of the

salt, that the salt was imported by the owner of the vessel, and that, while the sale of the salt as made by the latter was a sale of imported merchandise, the sale by Waring was not. This court took the latter view and decided that the tax was not a tax upon imports, saying (p. 120):

> * * * Influenced by these considerations the court is of the opinion that the shippers or consignees were the importers of the salt, and that the complainant was the purchaser of the imports, and the second vendor of the imported merchandise.

And again:

> But the sales of the goods imported in this case were made by the shippers or consignees, and the complainant was the purchaser, and not the first vendor of the imported merchandise, and it is settled law in this court that merchandise in the original packages once sold by the importer is taxable as other property.
>
> When the importer sells the imported articles, or otherwise mixes them with the general property of the State by breaking up the packages, the state of things changes, as was said by this court in the leading case, as the tax then finds the articles already incorporated with the mass of property by the act of the importer.
>
> Importers selling the imported articles in the original packages are shielded from any such State tax, but the privilege of exemption is not extended to the purchaser, as the merchandise, by the sale and delivery, loses its distinctive character as an import.

As was pointed out by the court in *Brown* v. *Maryland*, the principle underlying the distinction between what is a tax on imports and what is not, and what is a tax on exports and what not, is the same. Now if goods continue to be imports until they are sold or otherwise mixed with the general mass of property of the state into which they are imported, but cease to be imports immediately upon their sale by the importer, then it would seem to follow that goods do not become exports until after sale to the party who actually ships them out of the country and a tax upon the antecedent sale of goods is not a tax upon exports if the sale is consummated before the export process begins.

While I have followed my learned opponents in citing and quoting cases which did not arise under the export tax clause, but under other sections of the Constitution, particularly the Commerce Clause, yet I respectfully submit that cases under the Commerce Clause, which attempt to draw the boundary line between the respective powers of the Federal Government and of the States with reference to interstate and intrastate commerce, are not, in all respects, analogous to cases under the export tax clause of the Constitution. *They relate to different subjects and rest upon different bases of power.* The export tax exemption is not a part of the Commerce Clause as such. It is a part of the Taxing Clause of the Constitution and a restriction thereon, and the power of the Federal Government, under the taxing clause, is different and broader than the power of

regulation under the Commerce Clause. In the latter clause, the Constitution imposes upon this Court the very difficult and complex duty to divide commerce (which Mr. Madison, in the Constitutional Convention, had wisely termed an "indivisible unit") into two different fields of authority, viz, interstate and intrastate commerce. To make such a division workable in a very complex and concentrated age, such as ours, has required a great deal of very subtle reasoning. As a consequence, there are many expressions in opinions of this Court in cases under the commerce power, when a boundary line must be drawn between the field of Federal power and that of State power, which are inapplicable to the distinct and specific clause of the Constitution now under consideration, which imposes a restriction upon the greatest and most sweeping of all Federal powers, viz, that of taxation. The expressions of this Court as to when and where interstate commerce begins and ends can not be too closely applied to a very simple and tangible provision of the Constitution, which was obviously intended to prohibit both the Federal Government and the States from taxing exports *as exports*.

Thus the involved decisions which hold that interstate commerce includes the right both to buy and sell the goods transported in interstate commerce and as necessary parts thereof, are not applicable to an exemption which simply provides that articles exported can not be burdened with taxes by reason of such exportation. Unques-

tionably articles can not be exported unless they are first produced, and, when not exported by the producer, purchased. But the power of taxation, through excise taxes, over the manufacturer of articles or the sale of articles at a time when they are a part of the general mass of property can not be affected by the fact that the manufacturer or purchaser may have produced or bought them for the purpose of exportation. He can not be taxed for the privilege of such exportation. But, if he has bought the goods for purposes of exportation, *his vendor* can not therefore be exempted from liability to pay the same general sales tax as everyone else pays who makes a sale. Such a sales tax, imposed without discrimination, upon the sales of goods in this country, whether they are subsequently exported or are consumed in this country, does not impose any burden upon exportation, within the meaning of Article I, Section 9.

As I have shown, the framers had in mind a specific, direct and deliberate burden upon the act of exportation. They—especially the representatives of the Southern States—feared that the Federal Government might levy a direct tax upon the exports of tobacco, and, as such a tax might be prohibitive, it would virtually amount to an embargo. They were unwilling that the new government which they were creating should have such a power; but I think they would have rubbed their eyes in amazement at the contention that a general law, imposing an excise tax upon all sales of tobacco, whether sub-

equently exported or not, would be invalid, if, after such sale, the tobacco was exported by the vendee.

It is significant that the export tax clause, in the last days of the Convention, was connected with the clause forbidding a preference to the ports of any State. Here, again, the specific and restricted nature of the prohibition is shown. Many general taxing laws which affect in general the sale of the staples of commerce in this country might operate to discourage an exportation which would be largely made from certain ports, and yet it would hardly be contended that these indirect and accidental incidences of the exercise of the general taxing power would constitute a preference of one port over another. Thus, a high excise tax on the sales of cotton might lessen exports from Southern ports, and a low excise on sales of sugar might increase exportations from Northern ports; but who would contend that an unconstitutional preference was thus made?

Similarly, all taxes and revenue regulations may have an incidental effect upon the movement of exports. Reciprocity statutes may increase them, retaliatory statutes may reduce them; but, unless these impose a direct, specific fiscal burden upon the process of exportation, they are neverthelesss lawful.

JAMES M. BECK,
Solicitor General.

P. C. ALEXANDER,
Special Attorney, Bureau of Internal Revenue.

APRIL, 1923.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 710.

A. G. SPALDING & BROS.,
Plaintiff in Error,

vs.

WILLIAM H. EDWARDS, Collector of Internal Revenue for the Second District of New York,
Defendant in Error.

In Error to the District Court of the United States for the Southern District of New York.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The brief for defendant in error entirely ignores the only question at issue, viz., were the articles taxed while in course of exportation?

If the articles sold by the plaintiff in error were taxed while in course of exportation, such taxation was contrary to and in violation of Art. 1, Sec. 9, par. 5 of the constitution which provides that no

tax or duty shall be laid on articles exported from any State. (*William E. Peck & Co. vs. John Z. Lowe, Jr., Collector*, 247 U. S. 165; *Turpin vs. Burgess*, 117 U. S. 504).

In the first brief filed for the plaintiff in error (on pages 12 to 17) reference is made to decisions by this Court defining that which constitutes course of exportation which decisions hold that goods sold to an exporter in the United States to supply the demand of a foreign country were in course of exportation at the time of delivery to a carrier for transportation to the exporter at the port of export. (*Railroad Commission vs. Texas & P. R. Co.*, 229 U. S. 336; *Texas & N. O. R. Co. vs. Sabine Tram Co.*, 227 U. S. 111). There is, therefore, no question but that the articles sold by the plaintiff in error were taxed while in course of exportation.

The brief for the defendant in error quotes (on pages 16-18) the provisions of Section 602 of the Revenue Act of 1917, which provides:

> "That upon all articles enumerated in subdivisions (a), (b), (e), (f), (g), (h), (i), or (j), of section six hundred, which on the day this Act is passed are held and intended for sale by any person, corporation, partnership, or association, other than (1) a retailer who is not also a wholesaler, or (2) the manufacturer, producer, or importer thereof, there shall be levied, assessed, collected, and paid a tax equivalent to one-half the tax imposed by each such subdivision upon the sale of the articles therein enumerated. This tax shall

> be paid by the person, corporation, partnership, or association so holding such articles."

The apparent object of quoting this Section is to lead to the inference that the tax was assessed upon such articles in the possession of export houses, purchased by them for account of buyers in foreign countries prior to the time the Act took effect. Any such inference, however, would be entirely incorrect. The fact is that the Commissioner of Internal Revenue ruled, on January 2, 1919, that such articles in possession of the exporters were not taxable under Section 602. In this ruling the Commissioner said:

> "Articles so acquired by an export commission merchant and remaining in his custody on October 4, 1917, merely for the purpose of shipment to the foreign buyer for whose account and under whose specific instructions the articles were purchased, are not subject to floor tax on 'articles held or intended for sale' as the purpose is not to sell but to ship to a consignee who already has specific interest in those articles."

These articles were, therefore, exempt from tax under decisions of this Court because in course of exportation at the time such tax applied.

On page 17 of the brief for defendant in error learned counsel are also incorrect in stating that Congress

> "intended also to tax such articles that were still in the hands of the manufacturer, producer or importer on the effective date of the Act."

As a matter of fact such articles were explicitly exempted from tax under Section 602; and under Section 600 the articles were not taxed until they had been sold by the manufacturer, producer or importer.

On page 36 of the brief filed by defendant in error learned counsel say:

> "While I have followed my learned opponents in citing and quoting cases which did not arise under the export tax clause, but under other sections of the Constitution, particularly the Commerce Clause, yet I respectfully submit that cases under the Commerce Clause, which attempt to draw the boundary line between the respective powers of the Federal Government and of the States with reference to interstate and intrastate commerce, are not, in all respects, analogous to cases under the export tax clause of the Constitution. *They relate to different subjects and rest upon different bases of power.* The export tax exemption is not a part of the Commerce Clause as such. It is a part of the Taxing Clause of the Constitution and a restriction thereon, and the power of the Federal Government, under the taxing clause, is different and broader than the power of regulation under the Commerce Clause."

It is difficult to understand the purpose of the distinction which is thus attempted to be drawn between the power of the Federal Government with respect to the taxation of foreign commerce, and the power of the States with respect to the regulation of interstate commerce, and the bearing of any such attempted distinction upon the case of the plaintiff in error.

Can it be possible that the learned counsel mean to imply that the identical articles under identical circumstances can be in course of exportation when a law enacted by a State is under consideration, and yet not in course of exportation when a law enacted by Congress is under consideration?

As shown in the first brief for plaintiff in error (on page 26) the Attorney General, in an opinion dealing with Section 500 of the Revenue Act of 1917, which imposed a tax on the amount charged for the transportation of property within the United States, held that such tax could not be applied to the transportation of articles sold to exporters at the seaboard because such articles were in course of exportation at the time of delivery to the carrier by the vendors. This opinion was supported by the identical decisions of this Court which learned counsel now insist may not be cited by the plaintiff in error to establish the fact that the tax in question was laid on the articles while in course of exportation. It would, therefore, appear that when the Attorney General is construing a Federal tax law he may apply the definition given

by this Court to "course of exportation" in decisions relating to the interstate commerce clause of the Constitution, but that such decisions can have no application when cited by the taxpayer.

The extended reference by counsel in the brief for the defendant in error (on pages 8-16) to the debate in the Constitutional Convention upon the adoption of the clause forbidding a tax on articles exported, is instructive; but this Court has reviewed the history and purpose of this clause, and clearly determined its application, and has repeatedly said that a tax, either by a State or by Congress, can not be applied to articles in course of exportation. The decisions of this Court show clearly that when articles are placed in course of exportation the act of exportation has commenced; and hence the taxation of articles in course of exportation and the taxation of the exportation of such articles is one and the same thing. The act of delivery of the articles by plaintiff in error to the exporter was therefore as much a part of the act of exportation as the steps taken by the exporter to accomplish delivery of the articles to the buyers in the foreign countries.

On page 34 of brief for defendant in error counsel cite from the decision of this Court in *Waring vs. Mayor* (8 Wall. 110), but this has no bearing upon the case of the plaintiff in error. If in *Waring's case* he had sold the salt to an exporter in Mobile for export, or to a dealer there for transportation to another State, the tax upon the sale

would clearly have been invalid under the decisions. Waring's sale was in intrastate commerce.

The frequent and extended reference to *Coe vs. Errol* (116 U. S. 517), show that learned counsel for defendant in error have failed to note the difference between the imposition of a tax by a State before commerce commences and a Federal tax which can not be applied under the law until after the commerce had commenced.

Respctfully submitted,

FRANKLIN GRADY,
Attorney for Plaintiff in Error.

FRANK DAVIS, JR.,
Of Counsel.

A. G. SPALDING & BROS. *v.* EDWARDS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 710. Argued April 10, 11, 1923.—Decided April 23, 1923.

1. A sale of goods made in this country to a commission merchant for a foreign consignee, for the sole purpose of export, and consummated only when the goods, addressed to the foreign consignee, are delivered by the vendor to the exporting carrier, is a step in their exportation and, under Const., Art. I, § 9, cannot be taxed by the United States, even though the law under which the tax is imposed is a general one, not aimed specially at exports. P. 67.
2. Goods were started in exportation when so delivered to the carrier, notwithstanding the fact that the bill of lading was not issued until later, and, notwithstanding the possibility that the commission merchant, holding the title, might change his mind and divert them from their foreign destination. P. 69.

285 Fed. 784, reversed.

ERROR to a judgment of the District Court dismissing the complaint in an action to recover money exacted by the Government as a tax on a sale of goods.

Mr. Frank Davis, Jr., with whom *Mr. Franklin Grady* was on the briefs, for plaintiff in error.

Mr. Solicitor General Beck, with whom *Mr. P. C. Alexander* was on the brief, for defendant in error.

From the history of the Export Clause in the Constitution, it will appear that the framers had in mind a tax levied directly and deliberately upon the act of exportation. They were not considering the application of general taxing laws, which might fall in individual cases upon merchandise, which might thereafter be exported.

The tax levied by § 600 of the Revenue Act of 1917 is an excise levied upon the business of selling the particular

articles named in the statute and is measured by the price for which the article is sold. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245.

The constitutional provision has been often interpreted by the courts. The most recent cases clearly negative the plaintiff's contention. *Cornell* v. *Coyne*, 192 U. S. 418; *Turpin* v. *Burgess*, 117 U. S. 504; *Coe* v. *Errol*, 116 U. S. 517; *Southern Pacific Co.* v. *Arizona*, 249 U. S. 472; *Peck & Co.* v. *Lowe*, 247 U. S. 165; *Pace* v. *Burgess*, 92 U. S. 372; *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459. The cases which held taxes unconstitutional all clearly disclosed direct burdens upon some process or instrumentality of exportation. *Brown* v. *Maryland*, 12 Wheat. 419; *Almy* v. *California*, 24 How. 169; *Fairbank* v. *United States*, 181 U. S. 283; *United States* v. *Hvoslef*, 237 U. S. 1; *Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit to recover the amount of taxes collected by duress under color of the War Revenue Act of October 3, 1917, c. 63, § 600 (f), 40 Stat. 300, 316. The plaintiff, a corporation, manufacturer of the goods in question, says that the tax was laid on articles exported from a State, (New York,) in violation of Article I, § 9, of the Constitution of the United States. Upon demurrer the complaint was dismissed by the District Court on the merits.

The tax is " upon all . . . baseball bats, . . . balls of all kinds . . . sold by the manufacturer, producer, or importer " and was levied on three occasions admitted to be similar, so that the statement of one transaction will be enough. Delgado & Cia, a firm in the city of La Guaira, Venezuela, ordered Scholtz & Co., commission

merchants in New York, to buy for their account and risk a certain number of baseballs and baseball bats, &c., at an agreed price and to mark the packages D & C S La Guaira # 36 to indicate the purchasers and their place. Scholtz & Co. thereupon sent to the plaintiff in writing, dated December 10, 1918, this: "Export order from Scholtz & Co., Shipping and Commission Merchants . . . Please ship on or before the ..... per steamer .... Rush. . . . Errors in weight often entail heavy fines in Foreign Customs Houses, therefore be careful when weighing and marking Goods, as we shall hold you responsible for any fines caused through your errors. Cases or crates must be made to fit Goods as duty is paid by Gross weight. Shipping mark and number to be put on packages. [As above, with statement of the goods wanted.] Please send Memo. Invoice at once so we can apply for license and clear at Custom House." Scholtz & Co. instructed the plaintiff to deliver the packages so marked to the Atlantic & Caribbean Steam Navigation Co., an exporting carrier in New York. The plaintiff marked and delivered the goods as directed and was given a receipt by the carrier which it sent to Scholtz & Co. and which was exchanged by them for an export bill of lading in their name, dated February 10, 1919. The goods were transported and delivered in due time to Delgado & Cia. Scholtz & Co. paid the plaintiff on February 1 and were paid their commission by Delgado & Cia. in ninety days from date of shipment. The transaction from start to finish was understood and intended by the plaintiff and Scholtz & Co. to be for the purpose of exporting the goods to Delgado & Cia. in Venezuela. The question is whether the sale was a step in exportation, assuming as appears to be the fact, that the title

passed at the moment when the goods were delivered into the carrier's hands.

The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant if in this case the tax was "laid on articles exported from any State", because that is forbidden in terms by the Constitution. Article I, § 9. *United States* v. *Hvoslef*, 237 U. S. 1, 18. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292. Articles in course of transportation cannot be taxed. *William E. Peck & Co.* v. *Lowe*, 247 U. S. 165, 173. So we return to the question that we have stated. To answer it with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary. In this case, for instance, while the goods were in process of manufacture they were none the less subject to taxation if they were intended for export and made with specific reference to foreign wants. *Cornell* v. *Coyne*, 192 U. S. 418. *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245. On the other hand no one would doubt that they were exempt after they had been loaded upon the vessel for Venezuela and the bill of lading issued. It seems to us that the facts recited are closer to the latter than to the former side, and that the export had begun.

The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. The fact that further acts were to be done before the goods would get to sea does not matter

so long as they were only the regular steps to the contemplated result. Getting the bill of lading stands no differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Co. and that theoretically they might change their mind and retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Co. was solely for the purpose of Delgado & Cia. and for their account and risk. Theoretical possibilities may be left out of account. In *Railroad Commission of Louisiana* v. *Texas & Pacific Ry. Co.*, 229 U. S. 336, the consignees might have retained the goods at New Orleans instead of shipping them abroad. The fact that they came to New Orleans by rail from another place in the State made no difference. The same principle was applied in *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 123. The overt act of delivering the goods to the carrier marks the point of distinction between this case and *Cornell* v. *Coyne*, 192 U. S. 418. To put it at any later point would fail to give to exports the liberal protection that hitherto they have received; of which an example may be seen in *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U. S. 19.

Judgment reversed.